No. 12
Submitted

STATES.

12

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 363. 701

THEODORE HAWLEY, PLAINTIFF IN ERROR,

vs.

C. W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED NOVEMBER 28, 1877.

2 Bush, ill. D. 712
Bourse 14 to 1898
7 Blackford

59-63, 64 Indiana

No. 11
Submitted
Filed
Jan 3. 1880

12-314.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 363. 701

THEODORE HAWLEY, PLAINTIFF IN ERROR,

vs.

C. W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED NOVEMBER 28, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 363.

THEODORE HAWLEY, PLAINTIFF IN ERROR,

vs.

C. W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Original writ of error	2	1
Certificate of clerk	3	1
Petition	4	2
Answer	17	5
Record entry October 22, 1874	20	6
Amendment to answer	21	6
Record entry May 12, 1875	28	8
Record entry May 10, 1876	29	8
Finding of facts	30	8
Judgment entry October 30, 1876	33	9
Appeal bond	34	10
Original citation	38	11

1 Pleas in the circuit court of the United States of America, in and for the district of Iowa, at a term thereof begun and holden at the United States court-room in the city of Des Moines and district aforesaid, on the ninth day of October, the same being of the October term, A. D. 1876, of said court, before the Hon. John F. Dillon, United States circuit judge for the eighth circuit, and Hon. James M. Love, United States district judge for said district of Iowa.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between C. W. Upton, assignee in bankruptcy of the Great Western Insurance Company, plaintiff, and Theodore Hawley, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 1st day of Nov'r, A. D. 1876.

[SEAL.] ED. R. MASON,
Clerk U. S. C. C., District of Iowa.

Allowed.

Judge.

(Indorsed:) 1737. Filed Dec. 19, 1876. E. R. Mason, clerk.

3 In obedience to the foregoing writ of error, I, Edward R. Mason, clerk of the circuit court of the United States for the district of Iowa, do hereby certify and return that hereto annexed is a full, true, and complete copy of the record and proceedings and all things concerning the same in a certain cause wherein Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, is plaintiff, and Theodore Hawley is defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation is hereto attached and herewith returned.

Witness my hand and the seal of said court, at my office in Des Moines, in said district, this the 30th day of July, A. D. 1877.

[SEAL.] ED. R. MASON,
Clerk U. S. Circ't Court, Dist. of Iowa.

4 *Petition at law.*

Circuit court of the United States, district of Iowa.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, plaintiff,
against
THEO. HAWLEY, DEFENDANTS.

To the said circuit court of the United States for the district of Iowa:

The plaintiff, Clark W. Upton, as assignee in bankruptcy of the Great Western Insurance Company, claims of the defendant, Theodore Hawley, the sum of nine hundred and fifty dollars as money justly due him from the said defendant, with interest at the rate of six per cent. per annum from and after the 15th day of August, 1872, and for cause of such claim, and for showing as to the jurisdiction of this court in the premises, avers:

That the Great Western Insurance Company is a body corpo-
5 rate heretofore created and existing under the laws of the State of Illinois, having its principal office and place of business at the city of Chicago, in said State, and as such corporation was and is a resident and citizen of said State. The plaintiff, Clark W. Upton (as assignee in bankruptcy of said Great Western Insurance Company, as hereinafter more fully set forth), is also a citizen of said State of Illinois, and is a resident of the city of Chicago, in said State.

Plaintiff avers that said Great Western Insurance Company was duly constituted a body corporate by virtue of an act of the legislature of the State of Illinois, entitled "An act to incorporate the Great Western Insurance Company of Chicago, Illinois," approved February 4, A. D. 1857, and as such corporation had full power and authority to make contracts for subscriptions to its capital stock, and to issue certificates therefor, and that by the terms of said act the capital stock of
6 said company was fixed at five thousand dollars. That said company had power under its said charter to make contracts of insurance and take risks on all kinds of property, and to charge and receive premiums therefor.

Plaintiff avers that afterwards, to wit, on the 25th day of June, 1870, said Great Western Insurance Company was reorganized by the stockholders and directors thereof under the general incorporation acts of the State of Illinois, and its capital stock authorized to be increased to five millions of dollars. That said capital stock was divided into shares of one hundred dollars each, the subscription and payment for which stock constituted its only fund and means of paying the losses it might meet in the prosecution of its business. That by its charter said corporation was empowered to do any and all acts consistent with the constitution and laws of the State of Illinois.

7 That by the laws of the State of Illinois in such case made it was provided that the corporators of any insurance company organized in the State of Illinois should severally be liable for all debts and responsibilities of such company to the amount of stock by him or them subscribed until the whole amount of the capital stock of such company shall have been fully paid in, and a certificate thereof recorded.

Plaintiff avers that the defendant, Theodore Hawley, is a citizen of the State of Iowa, and a resident at Ft. Dodge, in said State, and that

said defendant heretofore, to wit, on or about the 7th day of Jan'y, 1871, made and entered into a contract of subscription and subscribed for ten shares of the capital stock of said Great Western Insurance Company of one hundred dollars each, and became indebted and obligated to pay therefor the full amount of said stock, to wit, the sum of
8 ten hundred dollars, as follows: five per cent. of said sum to be paid down or upon delivery of certificates of the stock*ed* subscribed for, five per cent. in three months from the date thereof, five per cent. in six months from the date thereof, and five per cent. in nine months from the date thereof, and the balance, to wit, eighty per cent. thereof, whenever lawfully called upon therefor according to the charter of said company and the laws of the State of Illinois, under which said organization existed.

Plaintiff avers that said Great Western Insurance Company did execute and deliver to said defendant certificates for said ten shares of its capital stock in pursuance of said subscription, and that said defendant has received and accepted the same, and has paid thereon the several instalments, to wit, one installment of five per cent. on each share
9 of stock so subscribed, in the aggregate the sum of fifty dollars, and no other further or different sums, whereby the said defendant became and ever since has been a stockholder in said Great Western Insurance Company, subject to all the rights, privileges, and profits enuring to the stockholders thereof in proportion to the shares of stock held by him, and in like manner subject to all the burdens and liabilities of the stockholders in said company.

Plaintiff shows that on the faith of said subscription for stock by said defendant, and other subscriptions of like nature to the amount of hundred thousand dollars, in pursuance of its increase of stock as aforesaid, the said Great Western Insurance Company obtained faith and credit with the public and was *u*nable' to make contracts' for insurance and to receive large sums of premiums upon risks assumed and policies issued.

That in pursuance of the requirements of the statute of the State
10 of Illinois in such cases made and provided, the amount so unpaid of defendant's stock subscription, together with the unpaid subscriptions of all and singular the other stockholders in said Great Western Insurance Company, were by the officers and agents of said Great Western Insurance Company reported to the auditor of state of the State of Illinois, and said company otherwise made public and advertised the same as assets and available resources of said company, upon the faith of which statements so made to the public through said State department and otherwise said company obtained public faith and credit, and was *u*nabled to *e*xtend its business and procure contracts of insurance, and did receive premiums to a large amount for the use and benefit of its said stockholders.

Plaintiff avers that afterwards, to wit, on the 3d day of Janu-
11 ary, A. D. 1872, to wit, at Chicago, in the State of Illinois, in consequence of great losses which said insurance company had prior to that time sustained by fire in said city of Chicago aforesaid and elsewhere, its entire cash capital and assets were exhausted, and said company became liable to its policy-holders to an amount greatly exceeding all its cash funds and means of payment and in an amount largely in excess of all sums that can be collected on its entire unpaid capital stock and assets, which said liabilities are still outstanding, due, and unpaid, and for the purpose of providing means of payment thereof, the said insurance company, by a vote of its directors and stockholders duly convened for that purpose, to wit, on the day and year aforesaid,

to wit, at Chicago, in the State of Illinois, aforesaid, duly assessed, called in, and ordered paid, to wit, twenty per cent. of the then remaining unpaid eighty per cent. on each share of stock, to wit, twenty
12 dollars on each share thereof so held by its stockholders on said unpaid capital stock, of which the said stockholders then and thereafter had notice, and which said sum so assessed, called in, and ordered to be paid is still due and owing from said defendant.

Plaintiff avers that afterwards, in consequence of its losses so sustained as aforesaid and the delinquencies of its stockholders in the payment of the calls so made upon them as aforesaid, the said Great Western Insurance Company became unable to meet its liabilities, and upon a petition filed in bankruptcy on the 17th of Jan'y, 1872, by Richard M. Hooley against the said Great Western Insurance Company, the said insurance company was afterwards, to wit, on the 6th day of Feb'y, A. D. 1872, adjudicated a bankrupt by the district court of the United States for the northern district of Illinois in pursuance of the act of Congress of the United States in such case made and provided,
13 as by the records thereof now remaining in said court will more fully and at large appear.

Plaintiff avers that on the 11th day of April, A. D. 1872, the said Clark W. Upton, plaintiff, was duly appointed assignee in bankruptcy of the estate of the said Great Western Insurance Company, in conformity with law and a deed of assignment of all the estate, effects, and property of the said Great Western Insurance Company, bankrupt, as aforesaid, was executed in due form of law under the hand and seal of Homer N. Hibbard, esq., register in bankruptcy for the Congressional district of the State of Illinois, and delivered to the said Clark W. Upton, so appointed assignee as aforesaid, thereby vesting in the said assignee the estate, property, and effects of the said bankrupt.

Plaintiff avers that the said district court of the United States sitting in bankruptcy in and for the northern district of Illinois, on the ap-
14 plication and petition of the said Clark W. Upton, assignee of the estate of said bankrupt as aforesaid, to wit, on the 5th day of July, A. D. 1872, made and entered of record in said court a call upon the stockholders of said bankrupt for the full payment of the entire unpaid capital stock of the said bankrupt severally held by them and each of them, and ordered the same paid as hereinafter set forth, which said call and order of payment was of the following tenor and effect, to wit:

In the matter of the Great Western Insurance Company, bankrupt. In bankruptcy.

And now on this day comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court, showing that a large amount of capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required
15 to be paid in order to meet the demands now due from and proved against the estate of said bankrupt.

And upon the investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to said assignee on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof that said assignee proceed to collect the same.

It is further ordered that notice of this call be given to the stockhold-

ers of said bankrupt so far as known without unreasonable delay, by publication or otherwise.

And the plaintiff, assignee as aforesaid, avers that notice in accordance with the terms and conditions of said order was duly given to the stockholders of said bankrupt, as therein and thereby required.

16 Plaintiff further avers that personal notice of said order has been heretofore duly given to said defendant and demand made of payment of the amount due and ordered to be paid as aforesaid, to wit, the sum of 95 per cent. of the amount of stock subscribed by said defendant as aforesaid, and the said defendant has wholly refused to pay the said sum or any part thereof.

Wherefore plaintiff brings this suit and asks judgment against said defendant for said sum of nine hundred and fifty dollars, with interest at six per cent. from the 15th day of August, 1872, and for costs of suit, and plaintiff asks that summons issue to said defendant according to law.

NOURSE, KAUFFMAN, AND HOLMES,
Attorneys for Plaintiff.

Filed July 25, 1873.

GEORGE B. CORKHILL, *Clerk.*

17 In the circuit court of the United States for the district of Iowa.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company,
vs.
THEODORE HAWLEY.

Comes now the above-named defendant, and for answer to the petition of the plaintiff herein says:

That he denies that he is indebted to the plaintiff in the sum of $, as claimed by him in the petition herein, or in any other sum or amount, and denies that he is in any manner indebted to plaintiff in any sum whatever.

Defendant denies that on or about the day of , 187 , or at any other time, he either made or entered into a contract of subscription, or subscribed for ten shares or any shares of the capital stock of the Great Western Insurance Company, or that he either become in-

18 debted or liable to pay therefore the full amount of $100 for each of said shares, or any amount by installments of five per cent., as alleged by plaintiff, and denies that he in any manner became liable to pay eighty per cent. thereof when lawfully called upon, as alleged by plaintiff.

Defendant denies that the Great Western Insurance Company, in pursuance of said subscription, or any subscription whatever, by this defendant, at any time executed and delivered to defendant certificates for ten shares, or any share or shares of the capital stock of said company, or that defendant has either received or accepted the same, or paid any installments thereon as averred by plaintiff, and denies that defendant ever became a stockholder in said Insurance Company, or that he is subject to the rights and privileges of a stockholder in said company, or in any manner liable to the burdens or liabilities of a stockholder in said company as alleged by plaintiff.

19 Whereupon defendant prays judgment against plaintiff for costs.

J. M. ELLWOOD,
Def't's Att'y.

(Endorsed:) No. 1737. Upton vs. Hawley. Answer. Filed Mar. 31, 1874. George B. Corkhill, clerk. J. M. Elwood.

20 United States circuit court, district of Iowa, October term, 1874.

C. W. UPTON, ASSIGNEE, *vs.* THEO. HAWLEY. } No. 1637. Law.

THURSDAY, *October 22nd*, 1874.

This cause came on this day, and defendant is given leave to amend his answer herein and cause continued.

21 Circuit court of the United States for the district of Iowa.

C. W. UPTON, ASSIGNEE, *vs.* THEO. HAWLEY. }

The defendant above named, having first obtained leave of the court, amends his answer heretofore filed herein as follows:

I. Defendant, not intending to waive any of the matters in his original answer, but by way of amendment thereto, says:

That heretofore, to wit, on or about the day of Jan'y 1871, one Rossiter called on defendant at his office in Fort Dodge, Iowa, representing himself as the agent of the Great Western Insurance Company of Chicago, Illinois, which he said was a very wealthy and prosperous company, having a large amount of capital stock paid up, and solicited defendant to subscribe to the capital stock of said
22 Insurance Company; that said agent further stated to defendant that said company was during a large and prosperous and paying business; that they desired to increase the capital stock and procure a large number of persons residing at various points in the West to take the same and thereby become interested in the prosperity and success of said company and use their influence in increasing and extending its business; that any person subscribing to the stock of said company would be required to pay only twenty per cent. upon each share of said stock so subscribed for; that said stock was non-assessable for any amount over and above the said twenty per cent., and that that fact appeared and was stated upon the face of the certificates of their stock; that this defendant, should he subscribe for any of said stock, would never be liable for any more than twenty per cent. of the par
23 value of the same, and that the balance thereof would be payable only out of the profits of said company, and in no other way.

Defendant says that he was a resident of Iowa, and has been for many years, and was not acquainted with the laws of Illinois or the charter of the Great Western Insurance Company of Chicago, nor its manner of doing business, nor its powers, or the rights and liabilities of its shareholders, and believed the representations made to him by said Rossiter.

Defendant further says, that relying upon the truth of the represen-

tations so made to him by said Rossiter, he signed a contract or bond for ten shares of the stock of said Insurance Company, whereby he agreed to pay in full payment thereof, fifty dollars down; fifty dollars in three months; fifty dollars in six months, and fifty dollars in nine months from the date thereof; that at the time of the signing of said
24 contract and bond, said Rossiter represented and stated to defendant that said payments would be a full payment and discharge of all obligations and personal liabilities of all kind' whatsoever of defendant, by reason of his contract so made.

Defendant charges that all of said statements and representations were made by said Rossiter at the instance and by the connivance and procurement of the said Great Western Insurance Company; that they were utterly false, and were known to be false, and were fraudulently made, and made to deceive defendant, and that they did deceive and mislead him; defendant avers that he never subscribed to the capital stock of said company, nor became a stockholder in said company, except as herein stated, nor did he authorize any agent of said company or any other person to enter his name on the books of said company as a stockholder therein, or knew that the same was done, nor did
25 he hold himself out as a stockholder therein, nor authorize any person to do so for him, and he avers that no certificate of stock was ever issued and delivered to him by said company, or by any other person for it; that he was never called upon by said company to pay either of the three deferred payments and that he never knew that the contract or bond so signed by him had been returned by said Rossiter to said company until on or about September, 1873.

Defendant avers that he never knew or was advised by any person that he was liable, or suspected as being liable, to pay to said company, or to its creditors, any more than the amount of said twenty per cent., nor that said company or its creditors, or the representatives of said creditors, claimed or intended to claim any more than said twenty per cent. until after said company went into bankruptcy, and not
26 until a demand was made upon him by the agent of plaintiff just before the commencement of this suit, and after said company had been thrown into bankruptcy and plaintiff had been appointed assignee, and so defendant charges that the said representations of said Rossiter were false and fraudulent, and were made to defraud and deceive defendant, and did mislead and deceive him, and that the said Great Western Insurance Company was knowing to said fraud and was a party to it; that said company conceived and put said fraud in operation, and was and is a party to the same, and advised said Rossiter to perpetrate the same, and that defendant did not know of the said fraud respecting his liability for the eighty per cent., for which this action is brought, until after the said insurance company was thrown into bankruptcy, and when it was too late for him to procure *an* attempt to procure a cancellation of said contract on account of said fraud.

27 So defendant says he is not liable to plaintiff for the amount claimed in his petition herein, or any part thereof, and prays judgment as in his original answer herein.

J. M. ELLWOOD,
Def't's Att'ys.

(Endorsed:) C. W. Upton, assignee, vs. Theo. Hawley. Amendment to answer. Filed Oct. 21, 1874. George B. Corkhill, clerk.

28 United States circuit court, district of Iowa, May term, 1875.

C. W. UPTON, ASSIGNEE,
vs.
THEO. HAWLEY. } No. 1737. Law.

WEDNESDAY, *May* 12, 1875.

This cause coming on, was continued by consent.

29 United States circuit court, district of Iowa, May term, 1876.

C. W. UPTON, ASSIGNEE, &C.,
vs.
THEO. HAWLEY. } No. 1737. Law.

WEDNESDAY, *May* 10, 1876.

This cause coming on this day for hearing, plaintiff appeared by Mess. Nourse & Kauffman, and defendant by G. Parsons, and a jury being waived by the parties, the cause was submitted to the court upon the pleadings, proofs, and arguments of counsel, and the same was taken under advisement by the court.

29*a* *Finding of facts by the court.*

C. W. UPTON, ASSIGNEE, &C.,
vs.
THEODORE HAWLEY.

The plaintiff is assignee in bankruptcy, as alleged in the petition.

On the 2nd day of January, 1871, Rossitur, agent of the Great Western Insurance Co. (the bankrupt), requested defendant to take stock in said company.

Defendant, on certain representations by Rossitur, signed the following paper or bond:

30 No. .] THE GREAT WESTERN INSURANCE COMPANY. [$200.

[Stamp.]

Capital stock $500,000, with liberty to increase to 5,000,000 dollars.

Stock non-assessable.

Organized July 20th, 1857, under act of legislature approved March 4th, 1857.

Know all men by these presents, that for and in consideration of ten shares of the capital stock of the Great Western Insurance Co. of Chicago, Ills., received by me, I am held and firmly bound, and agree to pay the Great Western Ins. Co. of Chicago the sum of two hundred dollars in installments, as follows: twenty-five per cent. thereof upon receipt of stock certificate, twenty-five per cent. in three months from date hereof, twenty-five per cent. six months from date hereof, twenty-five per cent. nine months from date, with interest 10 per cent. after due.

Chicago, 7th Jan'y, 1871.

(S'g'd) THEO. HAWLEY.

Signed and delivered in presence of—

30*a* At the time the said bond or paper was issued to Hawley the latter paid Rossitur $25.00 and delivered to him the bond. It was not delivered on any particular conditions. It was delivered to an agent of the company's, namely, the said Rossitur.

The company afterwards came into possession of the bond and
31 entered Hawley's name on their books as a stockholder, and published him in their publications as one of their stockholders, Hawley having no knowledge of the publications. Hawley paid no other money, and no calls made upon him prior to the bankruptcy.

No certificate of stock was ever sent or delivered to Hawley, and he made no demand on the company for any certificate of stock.

Bankruptcy of the insurance company was caused by fire in Oct., 1871.

The defendant signed no subscription paper or any other paper than the bond above set out.

On the foregoing facts and the pleadings judgment was rendered for the plaintiff. The judges were opposed in opinion on the following questions:

1st. Whether the delivery of a stock certificate under the above circumstances was necessary to constitute the relation of stockholder between the defendant and the insurance company.

32 2. Whether the above facts constitute a defense to the action.

The judges being divided in opinion on the above questions hereby certify such division to the Supreme Court, pursuant to the statute in such case made and provided.

(Signed) JOHN F. DILLON.
J. M. LOVE.

(Endorsed:) No. 1737. Law. Upton vs. Hawley. Finding of facts. Filed Oct. 30, 1876. E. R. Mason, clerk.

33 United States circuit court, district of Iowa, October term, 1876.

C. W. UPTON, ASSIGNEE IN BANKRUPTCY,
vs.
THEODORE HAWLEY. } No. 1737.

MONDAY, *October* 30, 1876.

This cause having been heretofore submitted to the court, and the court being now fully advised, finds for the plaintiff and assesses his damages at the sum of eleven hundred & ninety & $\frac{19}{100}$ dollars.

It is thereupon considered, ordered, and adjudged that plaintiff have and recover of and from defendant said sum of eleven hundred and ninety and $\frac{19}{100}$ ($1,190.19) with interest thereon, and costs of suit taxed at $37.05, and that execution issue therefor.

The judges being divided in opinion on the questions arising in this case, it is ordered that the same be certified to the Supreme Court of the United States according to the statutes in such cases made and provided.

34 [Messenger print.]

Appeal bond to Supreme Court.

In the circuit court of the United States for the district of Iowa, Oct. term, 1876.

C. W. UPTON, ASSIGNEE OF THE GREAT WESTERN Ins. Co.,
vs.
THEODORE HAWLEY.

Know all men by these presents, that we, Theodore Hawley as principal and Erastus G. Morgan as surety, are held and firmly bound unto C. W. Upton, assignee, &c., plaintiff, in the penal sum of eighteen hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and assigns, firmly by these presents, dated this 15th day of December, A. D. 1876.

The condition of this bond is such that whereas the said Theo.
35 Hawley has appealed to the Supreme Court of the United States from the judgment or order of the circuit court of the United States for the district of Iowa, made at the October term of said court, A. D. 1876, in a certain cause in said court wherein C. W. Upton, assignee, &c., is plaintiff, and Theo. Hawley is defendant:

Now, if said Theo. Hawley shall pay all costs and damages that shall be adjudged against him and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment in order which the Supreme Court may render or order to be rendered by the said circuit court not exceeding in amount or value the original judgment or order, and all rents, or hire, or damages to the property during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal, and all costs and charges that may be awarded thereon by said Supreme Court, then this obliga-
36 tion to be void, otherwise to be and remain in full force.

(S'g'd) THEO. HAWLEY,
Principal.

(") ERASTUS G. MORGAN,
Surety.

Surety.

Filed and approved this 26th day of December, A. D. 1876.

(S'g'd) J. M. LOVE, *Judge.*

STATE OF IOWA,
Webster County, ss:

I, Erastus G. Morgan, do say upon oath that I am a resident and freeholder in the State of Iowa, and worth in real estate in the State of Iowa, not exempt from execution, over and above encumbrances, double the full amount of the within bond; that the said real estate above mentioned does not include a homestead; that it is owned by me and duly recorded in my name.

(S'g'd) ERASTUS G. MORGAN.

37 Subscribed and sworn to before me this 16th day of Dec., 1876.

(S'g'd) THOS. SARGENT,
U. S. Com'r for Iowa.

I hereby certify that I regard the within bond as good and sufficient for the amount.

(S'g'd) THOS. SARGENT.

STATE OF IOWA,
Webster County, ss :

I, M. H. Bliss, clerk of the dist. and circuit courts of said county and State, do hereby certify that I am personally acquainted with Erastus G. Morgan, the surety on the within bond; that I consider him good surety for the *the* amount therein named, and that I would approve said bond if in my court.

Witness my hand and seal of dist. court, at Fort Dodge, this 18th day of Dec., 1876.

(S'g'd) M. H. BLISS,
Clerk D. C.

Filed Dec. 27, 1876.

E. R. MASON, *Clerk.*

38 UNITED STATES OF AMERICA, *ss :*

The President of the United States to C. W. Upton, assigne' in bankruptcy of the Great Western Insurance Company :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Iowa, wherein Theodore Hawley is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable James M. Love, U. S. district judge for Iowa, & ex officio one of the judges of the U. S. circuit court for dist. of Iowa, this 26 day of December, 1876.

J. M. LOVE, *Judge.*

(Indorsed :) Filed Dec. 27, 1876. E. R. Mason, clerk.

(Indorsement on cover :) No. 363. Theodore Hawley, plaintiff in error, vs. C. W. Upton, assignee of the Great Western Insurance Company, a bankrupt. Iowa C. C. U. S. Filed 28 November, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1880.

NO. 101.

THEODORE HAWLEY, PLAINTIFF IN ERROR,

vs.

C. W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT, DISTRICT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR.

PARSONS & RUNNELLS, *Attorneys for plaintiff in error.*
NOURSE, KAUFFMAN & JACKSON,
Attorneys for defendant in error.

Supreme Court of the United States.

THEODORE HAWLEY, *Plaintiff in Error*,

vs.

C. W. UPTON, Assignee, Etc., *Defendant in Error*.

STATEMENT OF THE CASE.

January seventh, 1871, the plaintiff in error signed and delivered to one Rossitur his bond for two hundred dollars, payable to *The Great Western Insurance Company*, purporting to be in consideration of ten shares of the capital stock of that company. It was payable in four payments, as follows: *First payment*—*On receipt of stock certificate.* *Second*—Three months from date. *Third*—Six months from date. *Fourth*—Nine months. (*Trans.*, p. 4.) January 3, 1872, the company made an assessment upon its stockholders of twenty per cent (*id.*, p. 4). but no call was made upon Mr. Hawley. (*Id.*, p. 9). January 17, 1872, it filed its petition in bankruptcy (*id.* p. 4), and April 11 Mr. Upton was appointed assignee. A jury being waived the case was tried by the Court, which made a special finding of the facts (*id.*, p. 9), and the judges being opposed in opinion the case was certified to this Court.

The plaintiff in error submits that the facts found are not sufficient to support the judgment, and assigns the following

ERRORS.

I. It is not found that plaintiff in error became a stockholder in the company.

II. By the terms of the bond the *company* could have maintained no action upon it without first delivering or tendering a stock certificate.

III. Upon the facts found the rights of the plaintiff as representing the *creditors* of the company were only such as the bond upon *its face* gave him as representing the company *its payee*.

IV. The Court erred in holding that the payee could by its *ex parte* acts, not communicated to the maker of the bond, create a right of action in favor of its assignee whether representing it, or its creditors, *that the bond upon its face* did not give.

V. The Court erred in holding that the payee, or any one representing it, could change either the time of payment fixed in the bond—receipt of certificate—or the conditions upon which by its terms it became payable.

VI. The petition was wholly unproved in its entire scope and meaning.

ARGUMENT.

Upon the most familiar principles, even if the bond had *said nothing* as to the delivery of a stock certificate, the law would have held such delivery or tender, or at least an allotment of stock, a condition precedent to the right of the company to maintain an action, unless the defendant had in some way waived such delivery or estopped himself from making such a defense. The petition is drawn upon that view of the law. It has, however, no *relation* to the *bond*, which the Court finds to be the *only* subscription made by defendant (*Tr.*, pp. 3 and 9); but is drawn upon the idea that defendant had subscribed some *other* instrument. It says defendant "made and entered into a *contract of subscription* and subscribed for ten shares of the capital stock of said Great Western Insurance Company of one hundred dollars each and became indebted * * * as follows: *Five* per cent to be paid down *or upon* delivery of certificates of the stock subscribed for, *five* per cent in three months, *five* per cent in six months, *five* per cent in nine months, and the *balance, to-wit, eighty per cent, whenever lawfully called upon therefor according to the charter of said company and the laws of the State of Illinois;* —an obligation which perhaps the law might in favor of, certain parties and under certain circumstances imply, but which the company or one representing only its rights certainly could not *add* to this bond—that said Great Western Insurance Company did execute and *deliver* to said defendant certificates for said ten shares of stock *in pursuance of said subscription*, and that said defendant has *received and accepted the same.*"

All this is denied by the answer, and the Court found, in effect: *First*, that the defendant made no such agreement; *second*, that the company had delivered to him no certificate; and, *third*, that it had made no call upon him, and had in no way notified him that his name had been entered upon its books, or that it made any claim against him. In other words, it found the *issues* in defendant's favor, and thereupon rendered *judgment* against him.

Of course it is not claimed that a stock certificate is in all cases necessary to entitle one to the privileges and rights of a stockholder, still less that one who has taken part in the organization or business of a corporation may shield himself against the claims of its creditors by saying that he has no certificate. He may have all the privileges of a member of the corporation without a certificate, because as was said by the Court in *Ellis v. E. M. Bridge Co.*, 2 *Pick.* 243, it is not in his power to obtain one without the consent of the corporation; he may be subject to the claims of creditors, by putting himself, as this Court has said, into a *position* which *requires the performance of duties.* But it is only when he *has* put himself into such a position or has knowingly stood by without dissent when others have represented him as holding such a position,

and third persons have acted in reliance upon it, that one can be subjected to the liabilities of a stockholder without being *in fact* such. If the capital stock of a corporation is a trust fund for the benefit of its creditors and every one liable by reason of his membership to the extent of his unpaid subscription, upon the ground that otherwise he might be a stockholder or not as the enterprise was losing or profitable and third persons be thereby defrauded, it does not follow because the corporation has practiced a fraud upon *him* by reason of which he has become *almost* a stockholder, that he can be made liable even to its creditors by reason of the acts of third persons, the officers of the corporation, done without his knowledge or authority and to which he has given no assent. That is precisely this case.

Mr. Hawley signed the bond in question. The Court found that he made no other contract or subscription; he lived in another state, distant from the place where the corporation was organized and its business carried on; he took no part in its business and knew nothing of its transactions. Whatever rights its creditors had against him they got by reason of *his signing this paper*. If one may estop himself from showing the truth, or by his own wrong place himself in a position where he may be liable, without the ordinarily corresponding rights, it is only when he has misled others to their prejudice or done some act inconsistent with the claim which he is making. Mr. Hawley did no act but to sign this bond; he gave no authority to others to act for him, or to hold him out to the world as a stockholder of this company, or as holding any other relation to it, than that which this instrument by legal operation carried with it. To enable an assignee in bankruptcy or of any other kind to recover, where the original party could not, something more must be shown than the mere execution of the instrument which is the subject of the assignment. To say that this *something more* may be the act of a third person, done without my knowledge or authority, is to say that a third person may bind me without my knowledge or authority. That is in effect, we submit, what the Court below did say when it rendered this judgment. Mr. Hawley had signed this bond, if that authorizes the company to advertise him as one of its stockholders, and to obtain credit in reliance upon his subscription in this form, and it did so, then it may be conceded that in the proper action he would be liable as a stockholder. The finding is that the company *published* him as a stockholder but *without his knowledge*. If the company had a right to place his name upon its books, it was because *he* had a right *to demand* that it should be placed upon them. If he had such right it was because the execution and delivery of this bond gave it to him, *without payment either in whole or in part*. It was given for ten shares of stock—two hundred for a thousand non-assessable. Of course among themselves the members of the corporation had a right to make just such an agreement. The twenty-five dollars paid Rossitur was no part of the consideration for

the purchase of the stock. From what time *by the facts found* would he have had a right to demand *a share of the profits?* Manifestly from the time when he received his stock certificates, or became *entitled* to receive them. Having never received them and having never become entitled to receive them, he never became entitled to a share of the profits, and as there is no finding or pretense that he has done any act by which it can be said that he has "played fast and loose," or by which the public have been induced to give credit to the corporation, he stands here liable or not liable as your Honors shall hold the law to be upon the face of the bond which he signed. I submit that extrinsic facts have nothing to do with it, except in so far as such facts would have been competent between the original parties. The only material fact *there*, is that the company never delivered to him the certificate upon the *receipt* of which only, he was to make payment. I have not sought for authorities as to whether one may maintain an action without a performance of precedent conditions upon his part, for every *student* knows how that is, and as your Honors have had occasion to consider, times without number, when and under what circumstances, an assignee in bankruptcy, or other judicial proceedings, may recover where the bankrupt or other original party could not, both the rules and the principles upon which they rest, are too familiar and too well settled to be called into question. Proper consideration for the opinion of the *majority* in the Court below has made me try to look at the questions sent here as debatable, but the effort was a failure. None of the material allegations of the petition were proved, on the contrary they are all found against the then plaintiff. If anything remained to be affirmatively shown to make the defense complete, it was shown in the fact that the company failed to perform upon its part. If under any circumstances one whose promise was not only without the receipt of any consideration, or if any, one which has wholly failed, but expressly made conditional upon the precedent act of the other party may be made liable, the existence of any such circumstances was neither averred, nor proved, nor found. I submit the case with confidence that the facts found are not only not sufficient to support the judgment, but are such as to require that it should have been in favor of the other party; that whatever may be the rule as to the right of a corporation, or one representing both it and its creditors, to maintain an action upon an ordinary stock subscription for shares *in which nothing is said as to the time of payment* without first tendering a certificate, that when by the terms of the agreement payment is to be made only upon the receipt of a certificate, to hold that an action can be maintained without delivery or tender, would be not to construe the agreement which the parties have made but to make one for them.

GALUSHA PARSONS,

Parsons & Runnells. *of Counsel for Pl'ff in Error.*

OFFICE SUPREME COURT U. S.
FILED
NOV 22 1880
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 101.

THEODORE HAWLEY, PLAINTIFF IN ERROR,

vs.

C. W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT.

Argument for Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

PARSONS & RUNNELLS,
Attorneys for Plaintiff in Error.

NOURSE, KAUFFMAN & JACKSON,
Attorneys for Defendant in Error.

P. C. KENYON, Legal Printer, Des Moines, Iowa.

ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

The defendant in error, as assignee in bankruptcy of the Great Western Insurance Company, a body corporate, existing under the laws of the state of Illinois, brought this suit in the Circuit Court of the United States for the district of Iowa, to recover the unpaid installments of stock upon the following contract of subscription to the capital stock of the association.

"No. —. THE GREAT WESTERN INSURANCE COMPANY. $200.

[STAMP.]

"CAPITAL STOCK, $500,000, WITH LIBERTY TO INCREASE TO $5,000,000.

"STOCK NON-ASSESSIBLE.

"ORGANIZED, JULY 20, 1857, UNDER ACT APPROVED MARCH 4, 1857.

"*Know all men by these presents*; That for and in consideration of ten shares of the capital stock of the Great Western Insurance Co., of Chicago, Ill., received by me, I am held and firmly bound and agree to pay the Great Western Insurance Co., of Chicago, the sum of two hundred dollars, in installments, as follows: Twenty-five per cent. thereof upon receipt of stock certificate, twenty-five per cent. in three months from date hereof, twenty-five per cent. six months from date hereof, twenty-five per cent. nine months from date, with interest 10 per cent. after due.

"[SIGNED] THEO. HAWLEY.

"Chicago, 7th January, 1871."

The court found that the above bond was made and delivered to the agent of the insurance company, who solicited Hawley to subscribe to the capital stock of the company, and also found, especially, that at the time the said bond or paper was issued to Hawley, the latter paid the agent $25, and delivered to him the bond. It was not delivered on any particular conditions. It was delivered to an agent of the company's, namely, the said Rossiter. The company afterwards came into possession of the bond, and entered Hawley's name on their books as a stock-holder, and published him in their publications as one of their stock-holders, Hawley having no knowledge of the publications. Hawley paid no other money,

and no calls were made upon him prior to the bankruptcy. No certificate of stock was ever sent or delivered to Hawley, and he made no demand on the company for any certificate of stock.

Bankruptcy of the insurance company was caused by fire, in October, 1871.

The defendant signed no subscription paper or any other paper than the bond above set out.

On the foregoing facts and the pleadings judgment was rendered for the plaintiff. The judges were opposed in opinion on the following questions:

"1. Whether the delivery of a stock certificate, under the above circumstances, was necessary to constitute the relation of stock-holder between the defendant and the insurance company.

"2. Whether the above facts constitute a defense to the action.

"The judges being divided in opinion on the above questions, hereby certify such division to the Supreme Court, pursuant to the statement in such case made and provided.

"[SIGNED] "JOHN F. DILLON.
"J. M. LOVE."

ARGUMENT.

We have not been furnished any argument or brief for the plaintiff in error, and can only anticipate what may be offered in his behalf.

The only defense made to the claim of plaintiff below is, that no certificate of stock was ever tendered or delivered, and the question certified is, "whether the delivery of a stock certificate, none having ever been demanded, was necessary to constitute the relation of stock-holder between the defendant and the insurance company?"

This question is easily answered both upon principal and authority. The instrument signed by Hawley purports on its face to be a contract for "ten shares of the capital stock of the Great Western Insurance Company." And upon the signing of this contract and delivery thereof to the agent of the company, Hawley paid the first five per cent. in cash—

the bond being his written obligation to pay twenty per cent. of the whole amount of the stock.

The court further finds that this bond came into the possession of the company, and that the company recognized Hawley as a stock-holder, and entered his name on their books as such, and published him as one of their stock-holders.

The question asked by the court is answered by the other question, whether or not Hawley, up to the time of the bankruptcy of the company, could have enforced his right to this stock against the company and to his share of the profits of the enterprise, if profits there had been—if so, it is clear he must also accept of the responsibilities of his position.

And why not? The contract for the stock was upon a sufficient, lawful and valuable consideration. Neither party had claimed or declared any forfeiture of the contract, and no facts appear of record upon which any such forfeiture could have been claimed.

The following authorities appear to us to settle the question beyond a peradventure that Hawley did sustain the legal relation of a stock-holder to the company.

Spear vs. Crawford, 14 Wend., 23,

was an action of *assumsit* for unpaid installments of stock based upon a contract of stock subscription where no part of the stock subscribed had been paid for, and defendant had done no act as a stock-holder.

The contract subscribed was as follows:

"We, the subscribers, do severally agree to take the shares by us severally subscribed in the Harlan Canal Company,"

to which the name of defendant was subscribed for sixteen shares.

The court, in its opinion referring to the case of *The Chester Glass Co. vs. Dewey*, 16 Mass., 94, says that in that case—

"The same general principle that a subscriber to the stock of an incorporated company may be compelled to pay the subscription price, was held by the court; and the objection was there taken, that the defendant was not a stock-holder or member of the corporation, because he had no certificate for the

consideration of much importance tending to show that personal liability was contemplated.

The articles of association under the mining law contemplates a substantial capital raised for a defined purpose. This was not only to carry out the avowed object of the corporation, but for the protection of creditors. If the subscribers were not bound to pay for their stock there is nothing more than a nominal capital. Certainly it was intended that creditors should have the security of a real capital to the extent of the sum named as the aggregate stock.

The general principles applicable to this case have already been fully settled by this court in—

Tribblecock vs. Upton, 91 U. S., 45.
Sangers vs. Same, 91 U. S., 56.
Carver vs. Same, 91 U. S., 64.
Webster vs. Same, 91 U. S., 65.

We submit the case.

C. C. NOURSE, FOR
NOURSE, KAUFFMAN & JACKSON,
Attorneys for Defendant in Error.

12-318

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 374.

SAMUEL J. LANAHAN, APPELLANT,

vs.

JAMES E. SEARS AND CLARA SEARS, HIS WIFE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED DECEMBER 24, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 374.

SAMUEL J. LANAHAN, APPELLANT,

vs.

JAMES E. SEARS AND CLARA SEARS, HIS WIFE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
Bill of complaint and exhibits	1	1
Waiver of subpœnas	23	9
Order of court	24	10
Notice of application for writ of injunction	24	10
Bond for injunction	25	10
Demurrer	27	11
Order overruling demurrer, &c.	30	13
Final decree	30	13
Petition for appeal	32	14
Bond for appeal	35	15
Citation on appeal	37	16
Certificate of clerk	38	16
Original citation	39	17

1 *Bill of complaint.*

Be it remembered that at a term of the circuit court of the United States, 5th circuit, in and for the western district of Texas, begun and held at Austin, in said district, for the January term, A. D. 1877, among other the following proceedings were had, to wit:

CLARA SEARS AND JAMES E. SEARS, COMplainants.	In chancery.	108.
vs.	Chy.	
SAM'L J. LANAHAN, DEFENDANT.		

(Bill endorsed:) Filed February 28th, 1876. M. Hopkins, clerk.

In the United States circuit court within and for the 5th circuit and western district of Texas, sitting at Austin, in said western district, in chancery.

To the Hons. William B. Wood and Thomas H. Duval, judges of said court:

Now comes Clara Sears, wife of James E. Sears, and her husband, in form of law as required by the laws of this State, but no farther, and most respectfully represent that they are resident citizens of the county of McLennan and western district of Texas, and so appearing do most humbly complain to the court of one Samuel J. Lanahan, who is a resident citizen of the State of Maryland, one of the States of American Union, and so complaining the said Clara Sears doth most respectfully represent that she, the said Clara Sears and the said James E. Sears,
2 were lawfully married according to the laws of the State of Texas in that behalf provided on or about the 1st of November, A. D. 1869, and from thence until now have lived together as man and wife in the said State of Texas, and are now so living, the said James E. Sears being from said marriage until now the head of a family according to the constitution and laws of this State, and she, the said Clara, being his wife, and farther she, the said Clara Sears and the said James E. Sears, have had children born unto them.

Petitioner Clara Sears farther represents that she and her said husband after their marriage aforesaid and on or about the 25th day of May, A. D. 1870, acquired by purchase the following real estate, to wit, lots Nos. four, five, six, and seven (4, 5, 6, & 7), in block twenty-six (26), on 3rd street, in the city of Waco, and in the county of McLennan and State of Texas, and the improvements thereon situated, and further that on or about the 25 h day of May, A. D. 1870, he, the said James E. Sears, took possession of said lots Nos. four, five, six, and seven, and the improvements thereon, as their homestead, and from that date until now he, the said James E. Sears, as a married man and the head of a family, under the constitution and laws of this State, and she, the said Clara
3 Sears, as his wife, have actually been in possession and occupying the said aforesaid lots and improvements and are at the date of the exhibiting of this bill in the actual possession thereof as their homestead.

And farther, your petitioners represent that on or about the 12th day of January, 1873, and before and since that date, the said James E. Sears was a druggist doing business in the city of Waco, McLennan County, Texas, and that on the said 12th day of January, 1873, the said

James E. Sears was indebted to William Lanahan and Samuel J. Lanahan, doing busines in the city of Baltimore and State of Maryland, under the firm name and style of William Lanahan and Son, and to secure the payment of said indebtedness the said James E. Sears did make, execute, and deliver to the said Wm. Lanahan and Son his notes as follows: one payable 30 days after date for $394.05; one payable two months after date for $694.05; one payable three months after date for $694.01; one payable four months after date for $694.01; one payable five months after date for $694.01; one payable six months after date for $694.01; one payable seven months after date for $694.01; one payable eleven months after date for $1,500.00; and one note payable thirteen months after date for $1,500.00, and all of said notes being dated January 12th, 1873, and payable to said Wm. Lanahan & Son.

4 And petitioners further represent that on or about the 2nd day of May, 1873, the said Wm. Lanahan and Son did employ one R. R. Robertson as their agent, with full and ample power and authority in that behalf to collect and to secure the payment of the money due on and by virtue of said aforesaid notes, and farther that on said 2nd day of May, 1873, the said Wm. Lanahan & Son, acting by their said agent, the said R. R. Robertson, became very importunate and exacting about the collection and securing of the payment of the money named in said notes; and farther that the said James E. Sears on the said 2nd day of May, A. D. 1873, to secure time and prevent suit or other legal proceedings, did, his wife Clara Sears joining him, make, execute, and deliver to the said R. R. Robertson, agent of the said Wm. Lanahan and Son, their certain deed of conveyance, wherein they deeded to said R. R. Robertson the aforesaid lots four, five, six, seven (4, 5, 6, & 7), in block 26, on 3rd street, in the city of Waco, McLennan County, Texas, and your petitioners hereto attach a true copy of deed from him, the said James E. Sears, and his wife, Clara Sears, to said R. R. Robertson, and makes the same a part hereof and makes the same Exhibit A.

5 And farther, petitioners allege that although said deed, of which Exhibit A is a true copy, conveys the said lots four, five, six, and seven, in block 26, on 3rd street, in Waco, McLennan County, Texas, to R. R. Robertson individually, yet the truth is, that the said conveyance was in fact to the only use and behoof of the said Wm. Lanahan and Son.

And farther, your petitioners allege & say and charge that whilst the said debt of conveyance of which Exhibit A is a true copy, upon its face recites a consideration of $7,200.00 as having been paid to the grantors in said deed by the grantee therein, the truth and fact is that not one cent of money, or any other thing of value as consideration, was paid by the said grantee to the said grantors as consideration for said property, but said deed was made upon the sole consideration and for the sole purpose of securing the payment of the money named and specified in the said aforesaid notes with interest at the rate of 8 per cent. from Jan. 12th, 1873, until paid.

Petitioners farther represent that they did not give up or surrender to the said R. R. Robertson the use or possession of the said lots Nos. four, five, six, and seven, in block 26, on 3rd street, in the city of Waco, McLennan County, Texas, upon the making of said deed of con-

6 veyance of which Exhibit A is a true copy, but notwithstanding said deed of conveyance they, the said James E. Sears and Clara Sears, his wife, remained in possession thereof as their homestead on said 2nd day of May, 1873, and from thence until now have so remained in possession, and are now in possession.

Petitioners further represent that upon the execution and delivery of

said deed of conveyance of which Exhibit A is a true copy, nor at any other time, the said Wm. Lanahan & Son, in person nor by their agents, did surrender or offer to surrender, give up, or cancel the said aforesaid notes or any of them, but held the same and now hold the same and still by suit and otherwise demand the payment thereof from the said James E. Sears.

Petitioners farther represent that on said 2nd day of May, A. D. 1873, and as part and parcel of the same transaction in which the deed of conveyance of which Exhibit A is a true copy was executed, there was made, executed, and delivered to the said James E. Sears a certain writing or memorandum of agreement by the said Wm. Lanahan and Son, acting in their behalf by their agent, R. R. Robertson, who then and there held full powers from his principal so to act, which said certain writing
7 or memorandum of agreement is hereto attached and made a part hereof and marked Exhibit B.

Petitioners further represent that the deed of conveyance of which Exhibit A is a true copy, and Exhibit B are instruments of the same date, relate to the same subject matter, made by and between the same parties, and, although written on different pieces of paper, are but the two parts of a whole transaction, which whole transaction was & is a reality mortgage upon the homestead of the said James E. Sears and wife to secure the payment of a debt due by said James E. Sears to the said Wm. Lanahan & Son, and as such is such an instrument as they are informed and believe as cannot be enforced in the courts of the State of Texas, under her constitution and laws, against the rights of Mrs. Clara Sears, nor in the courts of the United States held in Texas.

Petitioners further charge that a deed from R. R. Robertson to Wm. A. Fort of lots four, five, six, and seven, in block 26, on 3rd street, in the city of Waco, McLennan County, Texas, executed on the day of , A. D. 187 , is a deed without consideration, and was so made to W. A. Fort for convenience, and that W. A. Fort took the title to said property in trust for said Wm. Lanahan & Son, and that the deed from said W. A. Fort to said lots aforesaid to the said Samuel J.
8 Lanahan of date Dec., 1875, is and was without consideration and was but a divesture of a trust, and that the said Samuel J. Lanahan holds under said deed from said Fort as trustee for Wm. Lanahan & Son.

Petitioners farther avers that they are informed, and believe such information to be true, that the aforesaid deed of May 2nd, 1873, from James E. Sears and Clara Sears to the said R. R. Robertson for the lots four, five, six, and seven, in block 26, in the town of Waco, McLennan County, Texas, and other property, although absolute upon its face, is in fact when taken in connection with all the facts herein set out, but a mortgage to secure the payment of debt and was so intended by all the parties thereto.

And petitioner farther says that at the date of the said deed, but in fact a mortgage, and from thence until now, and now, the said James E. Sears was and is a married man and the head of a family, and that Clara Sears was at the date of said deed, to wit, 2nd day of May, 1873, and is now the wife of said James E. Sears, and that they as husband and wife actually lived upon and occupied with their family on the 2nd day of May, 1873, and from thence until now, the said lots four, five, six, and seven, in Block No. 26, and on 3rd street, in the city of Waco,
9 McLennan County, Texas, as their homestead; and they farther aver that they are informed and believe such information to be true that under the constitution and laws of this State, the said deed, in fact

a mortgage, of date the 2nd day of May, 1873, of which Exhibit A is a true copy, cannot be enforced in law or in equity as against the homestead rights of her, the said Clara Sears, in said lots four, five, six, and seven and the improvements thereon; and farther they aver that they are informed and believe *and believe* such information to be true that the said Wm. Lanahan & Son, by and through their attorneys, well knew all the facts herein set out, but petitioners represent that the said Samuel J. Lanahan, contriving to injure and wrong them, and particularly the said Clara Sears, the wife, out of her homestead, did on the 20th day of December, 1875, and in the United States circuit court for the 5th circuit and western district of Texas, file his action of ejectment on trespass to try title against James E. Sears alone, omitting to sue the wife Clara Sears, intentionally as they are informed and believe, and have caused citation and notice of said suit to be served upon the defendant James E. Sears,
10 and in his suit aforesaid sets up title to said lots Nos. four, five, six, and seven, in block 26, in the city of Waco, McLennan County, Texas, by and through the said aforesaid deed from James E. Sears & wife, Clara Sears, to the said R. R. Robertson to W. A. Fort, and from W. A. Fort to Samuel J. Lanahan, and prays judgment at the January term, 1876, of said court against said James E. Sears, for said lots Nos. four, five, six, and seven, and improvements thereon, and for writ of possession against said James E. Sears; a certified copy of said suit No. 1653 on law docket is made a part hereof, marked Exhibit C.

Petitioners represent that they are informed, and believe such information to be true, that the matters herein set up and set forth are a good and valid defense to the said aforesaid action at law, and especially as to the rights of the said Clara Sears in her homestead, but that the facts herein are exclusively equitable in their nature, and cannot be made available at law to her.

Petitioners aver that should the said action at law aforesaid, No. 1653, be allowed to progress, and the plaintiff therein allowed to recover his judgment for the said lots four, five, six, and seven, in block No. 26, in the city of Waco, McLennan County, Texas, and improvements,
and a writ of restitution issue against said James E. Sears,
11 by force of such writ and the marital relation of him, the said James E. Sears, and his wife, Clara Sears, she, the said Clara Sears, will be wrongfully and unjustly and unlawfully ejected from her homestead, to her injury, damage and wrong. Petitioners represent that the plaintiff herein is a non-resident, but that F. H. Sleeper, a resident citizen of McLennan County, Texas, is his attorney of record in said suit No. 1653.

Premises considered, plaintiffs pray for leave to file this their bill, and for the usual notice to non-residents of this suit, and that your honors will compel defendant to answer hereto, and that your honors will grant the plaintiffs your most gracious writ of injunction restraining the said defendant herein from farther proceedings in suit No. 1653 aforesaid until the matters herein can be heard, and upon a final hearing that a perpetual injunction issue forever restraining the said Samuel J. Lanahan from any farther attempts to prosecute or carry out his suit at law aforesaid, suit No. 1563, and that have and recover of him, the said Samuel J. Lanahan, all her costs expended in her behalf in this suit, and for general relief.

A. J. EVANS,
Solicitors for Complainants.

12 UNITED STATES OF AMERICA,
Western District of Texas:

We, James E. Sears and Clara Sears, plaintiffs in the foregoing bill of complaint against Samuel J. Lanahan, containing thirteen pages and a part of a page, each and both well known to me, and being first duly sworn, upon their oaths, declare jointly severally that the matters and things set forth and stated in the said aforesaid bill of thirteen and a fraction pages, so far as therein stated upon their own knowledge are true and correct, and that so far as stated upon information of others, they believe to be true.

J. E. SEARS.
CLARA SEARS.

Sworn to & subscribed before me at Waco, Texas, December 31st, A. D. 1875.

[L. S.] J. F. BRINKENHOFF,
U. S. Commissioner West. Dist. of Texas.

And afterwards on the same day and date the following exhibits were filed:

Exhibit A is indorsed, to wit:

108, ch'y. J. E. Sears & wife. To deed. R. R. Robertson. Certify copy. Fee, 1.50. Filed February 28, 1876. M. Hopkins, clerk. Clara Sears and James E. Sears vs. Sam'l J. Lanahan. Exhibit A filed
13 with the bill. A. J. Evans, solicitor; and in words to wit:

EXHIBIT A.

STATE OF TEXAS,
County of McLennan:

Know all men by these presents that we, J. E. Sears and Clara Sears, his wife, of the county of McLennan and State of Texas, in consideration of seven thousand two hundred (7,200) dollars to us paid by R. R. Robertson, of the county of Travis and State of Texas, have granted, bargained, sold and released, and by these presents do grant, bargain, sell, and release unto the said R. R. Robertson the following described tracts or parcels of land situated in the county of McLennan and State of Texas, to wit: Lots number four (4), five (5), six (6), and seven (7), in block number twenty-six (26) on Third (3rd) street, in the city of Waco, opposite the female college. Also an one-third ($\frac{1}{3}$) interest in three acres of land purchased by me, the said J. E. Sears, & D. R. Wallace, and J. H. Sears, of P. F. Ross, and situated not far from the residence of Mr. Brooks, in the south part of the city of Waco, a part of the old Ross homestead, together with all and singular the rights, m*ember*, hereditaments and appurtenances to the same belonging in any wise incident or appertaining, to have and to hold all and singular the premises above mentioned unto the said R. R. Robertson, his heirs and assigns
14 forever, and we hereby consent with the said R. R. Robertson that we are lawfully seized of said land and premises; that we have a good right to convey the same, and that it is free from incumbrances.

And we hereby bind ourselves, our heirs and administrators, to warrant and forever defend all and singular the said land and premises unto the said R. R. Robertson, his heirs and assigns, against any person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands this 2nd day of May, A. D. 1873.

J. E. SEARS.
CLARA SEARS.

STATE OF TEXAS,
County of McLennan:

Before me, the undersigned notary public in and for the State and county aforesaid, personally appeared J. E. Sears, a party to the foregoing deed, bearing date the second day of May, A. D. 1873, to me well known, and acknowledged that he had executed the same for the purposes and consideration and purpose therein stated. Also personally appeared before me Clara Sears, wife of the said J. E. Sears, another party to said deed, and having been examined by me privily and
apart from her husband, and hearing said deed fully explained
15 to her, she, the said Clara Sears, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

In testimony whereof I hereto sign my name and affix my notarial seal at office in Waco, this second day of May, A. D. 1873.

[NOTARY SEAL.] R. W. DAVIS,
Notary Public McLennan County, Texas.

Filed for record the 3rd day of May, 1873, at 5 o'c. p. m.
Recorded May 9th, 1873.

THE STATE OF TEXAS,
County of McLennan:

I, D. R. Gurley, clerk of the district court and ex-officio recorder of McLennan County, Texas, do hereby certify that the above and foregoing is a true and correct copy of a certain deed from J. E. Sears and wife, to R. R. Robertson, and of the certificate of authentication as the same appears on page 496 of book S, one of the deed records of said county and State.

In testimony whereof and to certify which I hereunto sign my name officially and affix the seal of said district court at my office in the city of Waco, this 3d day of Dece'r, A. D. 1875.

[L. S.] D. R. GURLEY,
Clerk D. C. and ex-officio Recorder, McLennan Co., Texas,
By J. T. WALTON,
Deputy.

16 Exhibit B is endorsed to wit:

108, ch'y. Memorandum of my agreement with Mr. Jas. E. Sears & Mrs. Sears in regard to transfer of certain Waco property to me. R. R. Robertson, ag't Wm. Lanahan & Son, Waco, Texas, May 2, 1873. Filed for record April 25th, 1874, at 11 o'c. a. m. D. R. Gurley, clerk, by J. T. Walton, deputy. Not. .50; record, 1.50—$2.00. Filed February 25, 1876. M. Hopkins, clerk. Clara Sears and James E. Sears vs. Sam'l J. Lanahan. Exhibit B filed with the bill. A. J. Evans, solicitor; and in words to wit:

EXHIBIT B.

THE STATE OF TEXAS,
County of McLennan:

Whereas James E. Sears and Clara Sears, his wife, have made and executed to me certain deeds to the following described property in the city of Waco, State & county aforesaid, to wit: Lots numbers four (4), five (5), six (6), and seven (7), in block number twenty-six (26), together with all the improvements situated on the same, to secure the payment

of the following described notes or acceptances of the said James E. Sears in favor of Wm. Lanahan & Son, of the city of Baltimore, State of Maryland, to wit:

Note dated Baltimore, Jan'y 12, 1873, for 394.05, due thirty days after date.

Note dated Baltimore, Jan'y 12, 1873, for 694.01, due two months after date.

17 Note dated Jan'y 12, 1873, for 694.01, due three months after date.

Note dated Jan'y 12, 1873, for 694.01, due four months after date.

Note dated Baltimore, Jan'y 12, 1873, for 694.01, due five months after date.

Note dated Baltimore, Jan'y 12, 1873, for 694.01, due six months after date.

Note dated Baltimore, Jan'y 12, 1873, for 694.01, due seven months after date.

Note dated Baltimore, Jan'y 12, 1873, for 1,500.00, due eleven months after date.

Note dated Baltimore, Jan'y 12, 1873, for 1,500.00, due thirteen months after date.

All of said notes drawing eight (8) per cent. interest from January 12, 1873, until paid.

And whereas Dr. H. W. Brown has transferred by deed to me certain town lots in the said city of Waco, to wit, lots numbers eight (8) and nine (9), in block number twenty-six (26), to secure the payment of one thousand dollars loaned the afore-mentioned James E. Sears, by said house of Wm. Lanahan & Son, of Baltimore, for which amount the said Sears has given his note, dated Waco, Texas, May 2nd, 1873, bearing 8 % interest from date until paid, it is hereby agreed

18 and understood between Mrs. Clara Sears and James E. Sears that in the event of the said amount of one thousand dollars, with interest at the rate of 8 % per annum, being well & truly paid on or before the fourth (4th) day of May, 1874, that the said Dr. H. W. Brown shall be restored to all his rights and titles in and to said lots above mentioned, and that I will transfer back to the said Dr. H. W. Brown the said lots.

And it is farther understood that the transfer of lots 4, 5, 6, & 7, in block 26, in the city of Waco, is to be cancelled, and the property transferred back to the said James E. Sears and his wife Clara Sears, upon the payment by the said James E. Sears to me of the amounts named in the notes before mentioned, with interest at the rate of 8 % from January 12, 1873, until paid; Provided, that the amount paid by the said James E. Sears as rent, viz, six hundred and sixty dollars in gold per annum, from the 2nd May, 1873, shall be deducted from the interest calculated upon the said notes which the transfer of the said homestead place of the said Sears & his wife is made to secure, and that the said Sears is to be allowed the current premium on gold upon the said sum of six hundred and sixty dollars in gold.

In testimony whereof I have hereunto signed my name at Waco, McLennan County, Texas, this the 2nd day of May, 1873.

R. R. ROBERTSON,
Ag't for Wm. Lanahan & Son.

Witness—
W. T. ROBINSON.
Witness—
W. C. TOWNSEND.

19 THE STATE OF TEXAS,
County of McLennan:

Before me, D. R. Gurley, clerk of the district court and ex-officio recorder of McLennan County, Texas, personally appeared W. C. Townsend, a subscribing witness to the attached instrument of writing, bearing date the 2d day of May, 1873, and stated on oath that R. R. Robertson, who appears to have executed said instrument of writing, acknowledged in his presence that he had subscribed and executed the same for the purposes and consideration therein stated, and that he, the said W. C. Townsend, had signed the same as a witness at the request of the said R. R. Robertson, ag't for Wm. Lanahan & Son.

In testimony whereof I hereto sign my name officially, and affix the seal of said district court at office in Waco, this 25th day of April, A. D. 1874.

[L. S.]

D. R. GURLEY,
Clerk of District Court and Ex-officio Recorder of McLennan Co., Texas.
Per J. T. WALTON, *Deputy.*

THE STATE OF TEXAS,
McLennan County:

I, Davis R. Gurley, clerk of the district court and ex-officio recorder of McLennan County, Texas, do hereby certify that the above
20 and foregoing instrument and acknowledgement attached thereto, was filed for record April 25th, 1874, at 11 o,clock a. m., and was recorded on McLennan County deed book T, pages 389 & 90, on April 27th, A. D. 1874.

Given under my hand and the seal of said court at office in Waco, this the 27th day of April, A. D. 1874.

D. R. GURLEY,
Clerk of District Court and Ex officio Recorder of McLennan County, Texas.
By J. T. WALTON, *Deputy.*

Exhibit C is endorsed, to wit:

108, ch'y. Clara Sears and James E. Sears vs. Samuel J. Lanahan. Exhibit C filed with the bill, A. J. Evans, solicitor. Filed February 28, 1876. M. Hopkins, clerk. And in words, to wit:

EXHIBIT C.

In hon. U. S. circuit court, western dist. of Texas, at Austin, January term, 1875.

S. J. LANAHAN
vs.
J. E. SEARS.

To the honorable judges of said court:

The petition of Samuel J. Lanahan respectfully shows to the court that he is a citizen of the State of Maryland, & James E. Sears, who signs his name J. E. Sears, is a citizen of Texas and of the county of McLennan in said State of Texas.

21 Petitioner further shows, that on the 2d day of May, 1873, the said Sears, joined by his wife, Clara Sears, conveyed by deed, duly executed, to one R. R. Robertson, the following described lots of land lying & situated in the county of McLennan, State of Texas, to

wit, lots 4, 5, 6, & 7, in block 26 on 3rd street, in the city of Waco, according to the plat of said town. Also one-third interest in three acres of land, purchased by the said Sears, D. R. Wallace, and J. H. Sears, of R. F. Ross, and situated not far from the residence of Mr. Brooks, in the south part of the city of Waco, a part of the old Ross homestead in said county, and more particularly described as follows, to wit, in said county, beginning at a stake on the west line of the avenue, at the N. W. corner of a survey, in the name of Mrs. A. R. Fitzhenhaws; thence S. 45° W., 248 feet on the west line of said avenue, a stake for a corner; thence S. 45° E., 527 feet, a stake in the line of A. R. Hammond's survey; thence with the line of said Hammond's survey at N. 45° E., 248 ft., stake for corner in said line; thence N. 45° W., 527 ft. to the place of beginning.

Petitioner shows that by divers mesne conveyances from the said Robertson petitioner is now the legal owner of the same, and is
22 entitled to the possession of the same, and was so the legal owner and entitled to possession on the 17th day of December, A. D. 1875.

Petitioner shows that, notwithstanding the premises, on said last mentioned day, the said Sears entered upon said premises and took possession of the same and ousted petitioner therefrom, and has ever since remained in possession of the same, and on said day said Sears committed divers and sundry trespasses on said premises, cutting down trees thereon growing, to the damage of your petitioner one hundred dollars.

Petitioner shows that the monthly rent of said premises is well worth the sum of fifty dollars. Wherefore he sues and prays for citation against said Sears according to law, and on the final hearing petitioner prays for a judgment against said Sears for said land for fifty dollars per month rent therefor, from the 11th day of December, 1875, & for costs & for relief, special and general. Petitioner herewith files his title papers, & the defendant will please take notice of such filing, to wit, deed from J. E. Sears & Clara Sears to R. R. Robertson, dated 2nd day of May, 1873, & duly recorded in said county; deed from R. R. Robertson to W. A. Fort, dated 20th of March, 1875, & duly recorded in said county; deed from W. A. Fort to Samuel J. Lana-
23 han, dated December , A. D. 1875, and duly recorded in said county.

And, as in duty bound, &c., petitioners will ever pray.

SLEEPER, JONES & KENDALL,
Att'ys for Pl'ffs.

United States circuit court, western district of Texas, at Austin holding sessions:

I, Matthew Hopkins, clerk of the circuit court of the United States for the western district of Texas, at Austin, hereby certify that the foregoing and annexed three pages contains a full, true, and correct copy of the original petition in case No. 1653, entitled Sam'l J. Lanahan vs. J. E. Sears, as it appears of file in my office, and also of the original citation issued hereon to J. E. Sears.

In testimony whereof I have hereunto set my hand and the impress of the seal of court at Austin, this 20 day of December, A. D. 1875.

[L S.] M. HOPKINS, *Clerk.*

Waiver is in words, to wit:

Issuance of subpœna in this case waived. Notice of filing bill ac-

cepted. The clerk will enter appearance of defendant this day, Feb'y 29, 1876.

F. H. SLEEPER,
Att'y of Record for S. J. Lanahan.

24 Order of court is in words, to wit:

U. S. circuit court, west'n dist. of Texas.

AUSTIN, *Feb'y 28th*, 1876.

Having considered the foregoing bill and exhibits and argument of counsel thereon, it is ordered that upon the complainant's entering into bond and security, to be approved by the clerk of this court, in the sum of five hundred dollars, payable to the defendant, and conditioned that they will abide the decision made herein, and pay such sum of money and costs as may be adjudged against them, if the injunction be dissolved, that a preliminary injunction issue, as prayed for, restraining the defendant from all further proceeding in the case at law No. 1653, of Sam'l J. Lanahan vs. J. E. Sears, mentioned in said bill, until the further order of this court in the premises.

T. H. DUVAL,
U. S. Judge.

Notice of application for writ of injunction is endorsed, to wit:

No. 108, ch'y. Clara Sears & J. E. Sears vs. Sam'l J. Lanahan. In chancery. Notice of application for writ of injunction. Original. An exact copy tendered to F. H. Sleeper, on this day, Feb'y 14, 1876. A. J. Evans, solicitor for pl'ff. Filed Feb. 28th, 1876. M. Hopkins,
25 clerk. And in words, to wit:

In the United States circuit court for the 5th circuit and western district of Texas, sitting at Austin.

CLARA SEARS & JAMES E. SEARS
vs.
SAM'L J. LANAHAN. } No. . Suit in chancery.

F. H. SLEEPER,
Attorney for Def't:

Please stand notified that a bill has been presented in the above cause, and that a preliminary injunction is sought for in said bill, and that within a reasonable time said motion for a preliminary injunction will be pressed in open court or at chambers, say on Tuesday, February 15th, 1876, at 4 o'clock p. m.

A. J. EVANS,
Solicitor for Pl'ff.

Bond for writ of injunction is endorsed, to wit:

No. 108, ch'y. Clara & James E. Sears vs. Sam'l J. Lanahan. In chancery. Bond for injunction. Filed March 8, 1876. M. Hopkins, clerk. And in words, to wit:

In the United States circuit court within and for the 5th circuit & western district of Texas, sitting at Austin, in said western district, in chancery.

CLARA SEARS & JAMES E. SEARS
vs.
SAM'L J. LANAHAN.

Whereas on the 20th day of December, A. D. 1875, Samuel J. Lanahan instituted suit against James E. Sears, by filing his action of
26 ejectment on trespass to try title in the United States circuit court for the 5th circuit & western district of Texas, sitting at Austin, in said western district, setting up title to lots Nos. four, five, six, and seven, in block No. twenty-six, in the city of Waco, in McLennan County, Texas, said suit being numbered 1653 on the law docket of said court, and Clara Sears and the said James E. Sears have obtained from the Hon. T. H. Duval, judge of said United States court, his most gracious writ of injunction, restraining the said Samuel J. Lanahan from further proceeding in said suit No. 1653 until further order of said court: Now, therefore, we, Clara Sears and James E. Sears, as principals, and and , as sureties, acknowledge ourselves bound to pay to Samuel J. Lanahan the sum of five hundred dollars, conditioned that the said Clara Sears and James E. Sears will abide the decision of the court made herein, and pay such sum of money and costs as may be adjudged against them if the injunction be dissolved. Witness our hands and scrawls for seals this 3rd day of March, A. D. 1876.

CLARA SEARS. [SEAL.]
J. E. SEARS. [SEAL.]
J. H. SEARS. [SEAL.]
J. M. RIVEIRE. [SEAL.]

27 STATE OF TEXAS,
McLennan County:

I, D. R. Gurley, clerk of the district court of McLennan County, Texas, do hereby certify that the sureties, J. E. Sears, J. H. Sears, and J. M. Reveire, are to me well known; that they have and own property in the county of McLennan, subject to execution, worth at least the amount as obligated in said bond, and that I would, if said bond was presented to me for approval, in any cause pending in the district court of said county, re'dily approve the same.

As witness my hand and seal of office, in Waco, this March 4, 1876.

[L. S.]

D. R. GURLEY,
Clerk D. C. McL. Co., Texas,
Bey CHAS. R. BEATTY,
Deputy.

Bond approved March 8th, 1876.

M. HOPKINS,
Clerk.

And afterwards the following demurrer was filed, endorsed, to wit:

No. 108. In chancery. Clara Sears & James E. Sears vs. Sam'l J. Lanahan. Demurrer. Filed March 16, 1876. M. Hopkins, clerk; and in words, to wit:

In the Hon. United States circuit court for the western district of Texas, at Austin, in equity.

CLARA SEARS & JAMES E. SEARS
v.
SAM'L J. LANAHAN.

The demurrer of Samuel J. Lanahan to the bill of complaint of Clara Sears & James E. Sears, complainants.

28 This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner & form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that said complainants hath not by their said bill made such cases as entitles them in a court of equity to any relief from or against this defendant, touching the matters contained in said bill or any of such matters.

And for special cause of demurrer this defendant says said bill shows upon its face & by the averments therein made that complainants can only have relief against the judgment which they seek to enjoin by their said bill by tendering in court the mortgage debt, or so much thereof as may be equal to the value of the premises recovered in said judgment at law, and complainants have not, in their said bill, offered to redeem said property by paying the value of said property, which they are in equity and good conscience bound to do before they are entitled to the relief for which they pray.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur to said bill,
29 and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

SAMUEL J. LANAHAN.

I certify that in my opinion the foregoing demurrer of Samuel J. Lanahan, defendant, to the bill of complaint of Clara Sears & James E. Sears, complainants, is well founded in law and proper to be filed in the above cause.

F. H. SLEEPER,
Solicitor, & of Counsel for Defendant.

UNITED STATES OF AMERICA,
District of Maryland, ss:

Personally appeared before the undersigned, United States commissioner, duly appointed and qualified in and for said district, Samuel J. Lanahan, to me known, who, being duly sworn, on his oath deposes and says, that he has read the foregoing demurrer to the bill of complainants in this suit, and that the same is not interposed for the purpose of delaying said suit, or any proceedings therein.

Given under my hand and seal at the city of Baltimore and district of Maryland this 9th day March, A. D. 1876.

[L. S.] ROB'T LYON ROGERS,
U. S. Commissioner for Maryland.

30 And afterwards, to wit, the following entry appears upon the minutes of the court, to wit:

MARCH 6TH AND 7, 1877.

CLARA & JAS. E. SEARS
vs.
SAMUEL J. LANAHAN. } No. 108. Ch'y.

And now come on to be heard the demurrer of the defendants to the bill filed in this cause. And the complainants appeared by Flournoy & Evans, their solicitors, and the defendant by Sleeper & Walton, and the demurrer of the defendant having been argued by counsel, the court overruled the demurrer, and under the rule the defendant is required to answer the bill on the next rule day, unless the time be enlarged by the court.

And afterwards, to wit, the final decree appears upon the minutes of the court, to wit:

J. E. SEARS & WIFE
vs.
SAMUEL J. LANAHAN. } No. 108. Chancery.

TUESDAY, *April* 17, 1877.

Whereas it has been represented to us in our circuit court of the United States for the western district of Texas, in the 5th circuit, on the part of James E. Sears and his wife, Clara Sears, complainants, that they have lately exhibited their bill of complaint in our said circuit court for the 5th circuit and western district of Texas, against you, the said Samuel J. Lanahan, to be relieved, touching the matters
31 therein complained of, in which bill it is stated, among other things, that you, the said Samuel J. Lanahan, are combining and confederating, by an action at law in the United States circuit court for the western district of Texas, and the 5th circuit at Austin, to injure said complainants, and to recover from them the possession of their homeste'd in the city of Waco, as will be manifest from inspection of said cause No. 1652 on the law docket of the United States circuit court, entitled Samuel J. Lanahan vs. J. E. Sears, and that your action in said cause is contrary to good conscience and equity, and your having been herein heretofore temporarily enjoined in your action in the said aforesaid premises; and your demurrer to the bill of complaint having been heard and overruled, and having heretofore failed and refused to make answer to the said bill of complaint herein, we, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command and perpetually enjoin you, the said Samuel J. Lanahan, under the fines and penalties which may befall you in case of disobedience, that you do absolutely desist from any further proceeding under and by virtue of the said suit No. 1652 at law, entitled Samuel J. Lanahan vs. J. E. Sears, to recover the homestead of said J. E. Sears & wife.

32 It is further ordered that the defendant, Sam. J. Lanahan, do pay all costs in said suit No. 1652, aforesaid, and all costs in this behalf, and for which execution issue, and that this decree be enrolled for observance of all parties interested.

To which decree & orders of the court the defendant excepted and gave notice of appeal.

And afterwards, to wit, on Aug. 2nd, 1877, the following petition for appeal was filed, endorsed, to wit:

108. Chancery. Sears vs. Lanahan. Petition for appeal. Filed Aug. 2d, 1877. M. Hopkins, clerk; and is in words to wit:

CLARA SEARS & JAMES E. SEARS, COMplainants, *v.* SAMUEL J. LANAHAN, DEF'TS. } In chancery. No. 108.

Lately pending in the circuit court of the United States for the western district of Texas, at Austin, Texas, in said district.

To the honorable the Supreme Court of the United States of America:

The appeal of Samuel J. Lanahan, the above named defendant and appellant, respectfully showeth—

That upon the 28th day of February, A. D. 1876, the above named complainants, viz, Clara Sears & James E. Sears, filed their bill
33 in the circuit court of the United States for the western district of the State of Texas, at the city of Austin, Texas, against the above named defendant and appellant, wherein it was charged by the said complainants, & particularly by the complainant Clara, that this defendant & appellant was seeking by a suit of trespass to try title then pending in the circuit court of the United States, at law, for the western district of Texas, at Austin, to evict and eject said complainants from their homestead, a certain piece or parcel of land in the city of Waco, Texas, & within the jurisdiction of said court, & of value exceeding five thousand dollars.

That this said defendant and appellant would evict and eject them at such suit at law from their said homestead unless restrained in the prosecution of said suit at law; that such eviction would be against equity and good conscience, and in violation of law and the rights under the law of said complainants; and they prayed for relief in the shape, on final hearing, of a perpetual injunction directed to and against this defendant & appellant, perpetually enjoining and restraining him from the prosecution of his said suit at law.

34 That this defendant & appellant entered his appearance, & thereafter interposed demurrer to the bill of said complainants, both in general form & special form, which demurrer will be embraced in the transcript, & while being set for hearing and being heard, was by the court overruled, and this defendant & appellant required to answer at the next rule day after such overruling of demurrer by the court; but this defendant & appellant, relying on the sufficiency of his demurrer, general and special, declined to answer; when, on the 17th April, 1877, at the January term of said court, a final decree was taken, passed, & enrolled against this defendant & appellant, & in favor of said complainants, whereby & wherein the temporary injunction theretofore granted by the court was perpetuated, & this defendant & appellant forever prohibited, enjoined, & restrained from prosecuting his said suit at law, & decreed costs against him.

Wherefore this def't & appellant appeals from the whole of said final decree, & from the rulings of the court at every stage of the proceedings of said circuit court of the United States, and respectfully prays that

the decree of said circuit court and the bill, demurrer, pleadings,
35 & proceedings in the said cause may be sent to the Supreme Court of the United States without delay, & that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said circuit court and every part thereof may be reversed, and a decree made dismissing complainants' said bill with costs, or such other decree as to the said Supreme Court may or shall seem just.

SAMUEL J. LANAHAN,
By F. H. SLEEPER & WALTON,
GREEN & HILL,
Solicitors for Appellant.

Appeal allowed as prayed. Bond fixed at five hundred dollars.

T. H. DUVAL,
Judge U. S. Cir. C't West. Dist. Tex.

And afterwards, to wit, the following appeal bond was filed, endorsed, to wit:

108. Chancery. Sears vs. Lanahan. Bond on appeal. Filed August 2nd, A. D. 1877. M. Hopkins, clerk; in words to wit:

Supreme Court of the United States.

CLARA SEARS & JAMES E. SEARS, COMP'TS,
v.
SAMUEL J. LANAHAN, DEF'T. } No. 108. Chancery.

West dist. Tex., at Austin.

36 Know all men by these presents, that we, Samuel J. Lanahan, as principal, and as securities, are held and firmly bound unto Clara Sears & James E. Sears, in the sum of five hundred dollars, to be paid to the said Clara Sears & James E. Sears, their executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly & severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 30th day of July, A. D. 1877.

Whereas the above bounden Samuel J. Lanahan hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled cause, by & in the circuit court of the United States for the western district of Texas, at Austin, Texas:

Now, therefore, the condition of the above obligation is such, that if the above named Samuel J. Lanahan shall prosecute his said appeal with & to effect, and answer all costs if he shall fail to make good his plea, then this obligation be void; otherwise to remain in full force and virtue.

SAMUEL J. LANAHAN, [SEAL.]
By WALTON, GRENE & HILL,
His Atty's.
CHRISTOPHT RHODIUS. [SEAL.]
WM. WALTON. [SEAL.]

Approved.

T. H. DUVAL,
U. S. Judge.

37 *Citation on appeal.*

Citation on appeal issued and is endorsed, to wit:

In Supreme Court of the United States. Samuel J. Lanahan, appellant, vs. Clara Sears and James E. Sears, appellees. Citation on appeal. Issued 20th day of August, A. D. 1877. M. Hopkins, cl'k; in words, to wit:

UNITED STATES OF AMERICA:

To Clara Sears and James E. Sears, or their attorneys and solicitors of record, A. J. Evans and Wm. M. Flournoy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein Samuel J. Lanahan is appellant, and you are appellees, to show cause, if any there be, why the final judgment in the said petition for appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 20 day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

[L. S.] T. H. DUVAL,
U. S. Judge.

Test with seal of court, at Austin, this 20th day of August, A. D. 1877.

38 Return of service is endorsed thereon in words, to wit:

STATE OF TEXAS,
McLennan County:

Personally appeared before the undersigned, notary public in and for said county and State, duly elected and qualified, F. H. Sleeper, who, being duly sworn by me, on his oath says, that he delivered a true copy of the within citation to William M. Flournoy, the attorney of record in the case referred to in said citation; the same was delivered on the 31st day of August, A. D. 1877, at the office of said Flournoy, in the city of Waco, in said county.

Sworn to before me. To certify which I hereunto sign my name and affix my seal of office at office in Waco, Tex., this 31st day of August, 1877.

[⅌ 146. T. C. S., N. P. SEAL.] THOS. C. SMITH,
Notary Public, McLennan Co., Texas.

I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, do hereby certify that the foregoing and annexed written pages contain a full and true transcript of the record, and all the proceedings had in chancery case No. 108, entitled in this court Clara Sears and James E. Sears vs. Samuel J. Lanahan, as they appear of file and record in this court.

In testimony whereof I hereto set my hand and the impress of the seal of said court, at Austin, this 3rd day of September, A. D. 1877.

[SEAL.] M. HOPKINS, *Cl'k.*

39 UNITED STATES OF AMERICA:

To Clara Sears and James E. Sears, or their attorneys and solicitors of record, A. J. Evans, and Wm. M. Flournoy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein Samuel J. Lanahan is appellant, and you are appellees, to show cause, if any there be, why the final judgment in the said petition for appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 20 day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

T. H. DUVAL,
U. S. Judge.

Test with seal of court at Austin, this 20 day of August, A. D. 1877.
[SEAL.] M. HOPKINS, *Clk.*

40 STATE OF TEXAS,
McLennan County:

Personally appeared before the undersigned, notary public in and for said county & State, duly elected and qualified, F. H. Sleeper, who, being duly sworn by me, on his oath says that he delivered a true copy of the within citation to William M. Flournoy, the attorney of record in the case referred to in said citation; the same was delivered on the 31st day of August, A. D. 1877, at the office of said Flournoy, in the city of Waco, in said county.

Sworn to before me. To certify which I hereunto sign my name and affix my seal of office, at office in Waco, Tex., this 31st day of August, 1877.

[⅋ 146. T. C. S., N. P.] THOS. C. SMITH,
Notary Public, McLennan Co., Tex.

(Indorsed:) In Supreme Court of the United States. Samuel J. Lanahan, appellant, vs. Clara Sears and James E. Sears, appellees. Citation on appeal. Issued 20 day of August, A. D. 1877. M. Hopkins, cl'k.

(Indorsement on cover:) No. 374. Samuel J. Lanahan, appellant, vs. James E. Sears & Clara Sears, his wife. W. Texas, C. C. U. S. Filed 24th December, 1877.

REC. 374—2

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1880. No. 112.

SAMUEL J. LANAHAN—(*Appellant*),

vs.

JAMES E. SEARS AND CLARA SEARS,
HIS WIFE—(*Appellees.*)

Appeal from the Circuit Court of the United States for the Western District of Texas.

BRIEF FOR APPELLANT.

I.

The appellees filed in the Circuit Court for the Western District of Texes their bill of complaint, asking for an injunction preliminary, and perpetual against the appellant.

The appellant (defendant in the Court below) demurred to the bill of complaint, which demurrer was overruled; thereupon, the defendant, relying upon the sufficiency of his demurrer, declined to answer, and the cause being submitted for final decree, such decree was

passed, whereby the preliminary injunction which had been granted upon the filing of the bill was made perpetual. (Record 13.)

It is from this decree that the present appeal is prosecuted. (Record 14.)

It will be thus seen that the propriety of the action of the Court below depends altogether upon the case made by the bill of complaint.

II.

We assign as error the overruling of this demurrer, and claim, for the reasons hereinafter stated, that the demurrer was good, and the bill should have been dismissed.

III.

The allegations of the bill are, in substance, as follows:

A. That the complainants, James E. Sears and Clara Sears, since November, 1869, have been husband and wife, and from thence until now have lived, and do still live, in the State of Texas; that they have children, and he, since his marriage, has been, under the Constitution and laws of Texas, the head of a family.

B. That in May, 1870, they purchased lots Nos. 4, 5, 6 and 7, in block 26, on Third street, in the city of Waco, Texas, with the improvements thereupon, and he thereupon took possession of the same as their homestead, and from that time up to the date of the filing of the bill of complaint, has, as the head of a

family, and with his wife, occupied the same as their homestead; and that they are, at the time of filing said bill, in the actual possession thereof as their homestead.

C. That said James E. Sears, who was in business in Waco, became indebted to the firm of William Lanahan and Samuel J. Lanahan, trading as William Lanahan & Son, of Baltimore, and in evidence of this indebtedness, gave them, on the 12th of January, 1873, nine promissory notes, running from one month to thirteen months, and aggregating $7858.19.

D. That on the 2d of May, 1873, those notes not having been paid, and the said firm pressing for their payment, or for security, the said James E. Sears, to secure time and to prevent legal proceedings, made an absolute deed of said homestead lots (4, 5, 6 and 7) to R. R. Robertson, who was the agent of said William Lanahan & Son, in which deed his wife, Clara Sears, joined.

That this deed, though made to said Robertson, was really for the benefit of said Lanahan & Son, and though purporting to have been made in consideration of the sum of $7200 paid to the grantors, no money was in fact paid, but was really made for the purpose of securing the payment of the above-mentioned promissory notes.

That there was executed and delivered, contemporaneously with the said deed, another writing, dated May 2d, 1873, by the said R. R. Robertson, which set forth that the said deed was made for the purpose of securing the said promissory notes, and that the said

instrument and said deed form part of one and the same transaction, and when taken together, convert the said absolute deed into a mortgage to secure the payment of the said promissory notes.

E. That notwithstanding the execution of said deed, the complainants never gave up the possession of the said homestead, but still occupy the same.

F. That subsequently the said property was conveyed by said Robertson to one Fort, without consideration, who conveyed it, in the same way to the appellant Samuel J. Lanahan, a member of said firm of William Lanahan & Son, who holds it for the benefit of said firm.

G. That said Samuel J. Lanahan, on the 20th day of December, 1875, commenced an action of ejectment in the Circuit Court of the United States, for the Western District, to try the title and recover the possession of the said homestead lots, making only the said James E. Sears, a party defendant; and that if he recovers judgment in said action, and a writ of restitution, she will be wrongly deprived of her homestead.

H. The bill (page 3, paragraph 2,) alleges that the deed of May 2d, 1873, and accompanying agreement, constitute a mortgage upon the homestead of the appellees, and as such, is such an instrument as cannot be enforced in the Courts of the State of Texas against the said Clara, nor in the Courts of the United States, and the prayer of the bill is for a *perpetual injunction*, restraining the said S. J. Lanahan from the further prosecution of said ejectment suit, and for a preliminary injunction in the meantime.

I. The complainant filed with the bill, as exhibits, the deed and accompanying agreement of May 2d, 1873. (Record, 5 to 7.)

IV.

Comparing the allegations of the bill with the relief prayed, and granted, it will be observed, that while the bill alleges that the deed of May 2d, 1873, is but a mortgage, and as such, is such an instrument as cannot be *enforced* either in the Courts of Texas, or of the United States, against the wife Clara Sears; and while this, taken by itself, would be probably interpreted to mean that the conveyance was void and should be set aside, yet, such is not at least the *actual* relief prayed for or granted, which is limited to an injunction restraining the appellant from any proceeding to obtain *possession* of the property conveyed.

We are, therefore, to consider whether the allegations of the bill entitled the appellees to the relief thus granted.

But if the conveyance of the property, as made, was void, this of course afforded ample ground for the restraint of any proceedings to recover its possession. We shall, therefore, have to enquire:

1. Whether the conveyance, as made, was void as against the appellees, or either of them.

2. Whether, if valid, the appellant was entitled to prosecute the proceedings which he had instituted on the law side of the Circuit Court of the United States for the Western District of Texas.

V.

1. Was the conveyance of the property, as made on the 2d of May, 1873, by the appellees, to Robertson, one which they had the right to make?

A. The appellant does not controvert the proposition made in the bill of complaint, that the deed of May 2, 1873, though absolute on its face, is to be construed in connection with the accompanying and contemporaneous instrument signed by the grantee, Robertson, and that so construed, the deed is to be considered as a mortgage to secure the promissory notes mentioned in the accompanying instrument.

B. But though a mortgage, and of the homestead, and to secure the indebtedness of the husband, yet, being executed in the form required by the laws of Texas, it is perfectly valid, and binding both on husband and wife.

This is fully established by the following cases:

6 Texas, 118, Sampson & Keene vs. Williamson.

38 Texas, 429, Jordan vs. Peak.

C. These cases abundantly establish the right of a married woman to alienate, by mortgage or otherwise, every species of property belonging to her, including the homestead, if the formalities required by the statute are complied with.

The statute requires an examination of the wife out of the presence of her husband, and a certificate, in a certain prescribed form, by the officer taking the

acknowledgment. This form will be found in Hartley's Digest, Laws of Texas, page 131, article 174, which form, by article 176, is declared applicable to conveyances relating to the homestead.

The form thus prescribed is that which was followed in the acknowledgment of the deed of May 2, 1873. (Record, 6.)

D. It cannot be controverted, in view of these cases, that the deed of May 2, 1873, though converted, by the accompanying contemporaneous defeasance, into a mortgage, yet was a valid instrument as against both Sears and his wife, and created a valid lien in favor of the grantee or mortgagee upon the property thereby conveyed; and that the said property can only be released from this lien by the payment of the debt thereby secured, or a sale of the property to satisfy the same.

VI.

This brings us to the second question noted above, that is to say:

A. Was the appellant (the mortgagee,) authorized to prosecute the proceedings which he had instituted in the Circuit Court of the United States for the Western District of Texas, and from the prosecution of which he was perpetually enjoined by the decree appealed from?

B. We have said that we do not deny that the deed of May 2d, 1873, taken in connection with the accompanying simultaneous defeasance is to be treated

as a mortgage. This is settled law in this Court as well as elsewhere.

12 Howard, 147, Russell vs. Southard.
19 Howard, 299, Wyman vs. Babcock.
96 U. S. 332, Peugh vs. Davis.

We are to treat the appellant, therefore, as if the deed of May 2d, 1873, had been in form a mortgage, to secure the payment of the promissory notes enumerated in the defeasance. He is then mortgagee, with all the rights of a mortgagee.

C. The action which he instituted on the law side of the Circuit Court of the United States, for the Western District of Texas, was an action in the nature of an action of ejectment to recover the possession of the property conveyed by the deed of May 2d, 1873. (Record, 8, 9.) This is apparent from an inspection of the petition itself. This Court in 16 Howard, 674, Bennett vs. Butterworth, speaking on this subject, said: "The common law has been adopted in Texas, but the form and rules of pleading have been abolished, and the parties are at liberty to set out their respective claims and defences in any form which will bring them before the Court."

This form was therefore properly used in the Circuit Court of the United States, for the District of Texas. (Rev. Stat. U. S. 914.)

D. It further appears that this action was instituted on the 20th December 1875. (Bill of complainant, record 4, folio 10.)

At this time all of the notes, for which the mortgage was given as a security, were overdue, the note last maturing having become due in February, 1874, nearly two years before the action was brought.

VII.

The question for decision is therefore, whether a mortgagee, under a valid mortgage of a homestead in the State of Texas, after default, and condition broken, may, in *the Circuit Court of the United States,* for the District of Texas, bring an action for the possession of the land so mortgaged.

To answer this question we must ascertain—

1st. Could such an action be maintained if the land mortgaged was not the homestead?

2d. Supposing the action could be maintained if the land was *not* a homestead, does the fact that it is a homestead defeat the action?

VIII.

Could such an action be maintained in the Circuit Court of the United States in Texas, if the land mortgaged was not a homestead?

A. We assume that it will not be controverted, that by the general principle of the common law jurisprudence, a mortgagee, at *least* after default, and breach of the conditions of the mortgage, may bring an action at law (ejectment, writ of entry, or whatever may be the

action in use in the particular jurisdiction) for the possession of the land mortgaged.

10 Wall. 529, Brobst vs. Brock.
1 Wall. 58, Hutchins vs. King.
9 Wheat. 494, Hughes vs. Edwards.
Story Eq. Jurisp., sections 1016, 1017.
4 Kent, 165, (marg.)

In 10 Wall. 529, it is said—

"It thus appears that what John Brobst acquired by the deed of Michael Brobst to him was only an equity of redemption. As between his grantor and Wood (the mortgagee) and Wood's assignees, the *legal title* was then in the *latter*, and so remained, notwithstanding the conveyance of the equity of redemption to John Brobst. It is true that a mortgage is, in substance, but a security for a debt, or other obligation to which it is collateral. As between the mortgagor and all others *than the mortgagee*, it is a lien; a security; and not an estate. *But as between the parties to the instrument*, or their parties, it is a *grant*, which operates to transmit the *legal title* to the mortgagee, and leaves the mortgagor only a right to redeem."

And after stating that formerly, upon condition broken, the forfeiture was absolute, the Court says:

"Courts of Equity have, in modern times, relieved against such forfeitures, and in favor of the mortgagor have extended the time for redemption; but such Courts, as fully as Courts of Law, have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained on the principle

that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid; and such is the law of Pennsylvania. There, *as elsewhere*, the mortgagee, after breach of the condition, may enter or maintain ejectment for the land; and having entered, he cannot be dispossessed as long as the mortgage remains in force."

The Court also held in that case, that where *mortgagee* was in possession, and the debt had been paid, the *mortgagor* should not bring ejectment, but must file his bill to redeem, in order that he may be compelled to do equity in case mortgagee has made improvements, &c.; and the Court, citing the Statute of 7 George, 11, chapter 20, which enacted that a mortgagee shall not maintain ejectment *after* payment or tender of the debt, says: "There could have been no necessity for such an enactment if the legal title had not remained in the mortgagee."

B. It being thus indisputable that, by the general principles of common law jurisprudence, the mortgagee may maintain an action for the possession of the mortgaged premises, at least after default, is there anything in the statute law or jurisprudence of Texas which will prohibit the maintenance of such an action in the *Circuit Court* of the United States sitting in that State?

C. In judicial proceedings in Texas there is no distinction between cases at law and equity, nor any separate Courts of Law and Equity.

This matter having several times come under the consideration of this Court, we refer to what has been said in these cases.

In 16 Howard, 674, Bennett vs. Butterworth, the Court, through the Chief Justice, says: "The common law has been adopted in Texas, but the forms and rules of pleading have been abolished, and the parties are at liberty to set out their respective claims and defences in any form which will bring them before the Court. And as there is no distinction in its Courts between cases at law or in equity, it has been insisted in this case, on behalf of defendant in error, that this Court may regard plaintiffs' petition either as a declaration at law or as a bill in equity.

Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the Courts of the United States; and although the forms of proceedings and practice in the State Courts have been adopted in the District Court, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be *blended* together in one suit. The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a *legal title* must proceed at *law*, and may undoubtedly proceed according to the forms of practice in such cases in the State Courts; but if the claim is an equitable one, he must proceed according to the rules which this Court has prescribed.

And so in 24 Howard, 423, Sheirburn vs. Cordova, the Court held, that though by the statute of Texas the holders of certificates of land scrip having an equitable title, might, on their equitable title, maintain ejectment, such title was not sufficient in such an action

brought in the Circuit Court of the United States in Texas.

And in 100 U. S. 103, Hurd vs. Hollingsworth, in a case which came from Texas, the Court declares that there can be no blending of legal and equitable causes of action in the Federal Courts.

D. An examination of the decisions of the Supreme Court of Texas will show, that while it is true that it has been held that a mortgagee may not bring, in the State Courts, an action for the recovery of the possession of the mortgaged property, and that the only proceeding he can take when his mortgage debt is due, is a proceeding to foreclose the mortgage, yet it is equally true, that the denial of this right is placed explicitly on the ground that in that State there is *no separation* of the equity and common law proceedings, but a blending of the two systems in one Court, and that the proceedings given by the statute of that State for foreclosure, join the remedy of a sale of the land, and a general judgment against the mortgagor; and, therefore, give to the mortgagee all the remedies he needs in the one blended proceeding.

The case in which this question first came up, and upon which subsequent cases have rested, is the case of—

Duty vs. Graham, 12 Texas, 427.

A. In the first place it will be noted, that the action by the mortgagee in this case to recover possession was brought under such circumstances as would induce the Court to apply the law as strongly as possible against him.

The *mortgage debt* had, in *law*, though not in fact, been *paid*, the mortgagee having failed to present it to the administrator of the mortgagor in the time required by the statute. As it is fundamental law that the mortgage is only a *security* for the debt, and the debt was *gone*, it was manifestly inequitable that the mortgagee should, by virtue of his legal title, get possession of the land. And the Court, in the conclusion of its opinion, after discussing the question whether under the peculiar blended equity and common law jurisdictions, an action for the possession could be maintained in the local Courts of Texas, says—

"But whether such an action could be maintained in any case, it certainly could not, where the debt has been paid."

B. But, independently of the particular circumstances under which the action was brought, an examination of the opinion of the Court will show that the Court rests its conclusions as to the right of the mortgagee to bring an action for the recovery of the possession of the land, altogether upon the fact that in the Texas Courts there is no separate common law and equity procedure, but a blending of the two.

To show this to be the correct view, we quote from the opinion:

"But it is contended by appellee that notwithstanding the debt is barred, and that with this bar his remedy by statute is gone, yet, that he is entitled to the land itself under an action of ejectment, or an action to try title to the land.

Whether an action by mortgagee to recover possession of the land would lie in this State, must depend (if it be not excluded by implication under our statute,) upon the character of right or title under which he holds. If his right be superior to that of the mortgagor, then on default of the latter, he might recover and hold possession at least until payment out of the rents."

The Court then proceeds to review the authorities, citing principally from Chancellor Kent's Commentaries, and then proceeds as follows:

"It seems that at law, upon the execution of a mortgage, the legal estate vests in the mortgagee, subject to a defeasance, upon performance of conditions. Technically speaking, the mortgagor has a mere tenancy, and is subject to be put out at any time, even before default, by the mortgagee. But even under the severe rules of the common law the mortgagor has some rights. He is not subject to payment of rents, and can lease, sell and deal with the land as owner, so long as he remains in possession, persons under him taking only subject to the rights of the mortgagee. But when we ascend to the views entertained of mortgages in Courts of Equity, we find an almost complete change of principles. The estate of the mortgagor, so narrow and precarious at common law, is, by equity, enlarged to real ownership of the fee. The mortgage, instead of being a conveyance of the land, subject to defeasance, is held to be but a chattel interest - a mere security for the debt. (4 Kent, 160.)

"It seems, then, that in equity the debt is the principal thing; the land is but an incident of the debt, and the mortgagor, notwithstanding the terms of convey-

ance, remains the real owner of the fee; why under such circumstances and such rights in the mortgagor the mortgagee should have been entitled to oust the mortgagee and take possession, is not very easily perceived, especially where such possession does not give him the land, but he is accountable for rents and profits.

"There might be some reason to permit such right at law, where, in equity, he is entitled to a corresponding, and, in fact, still higher right, under a decree of strict foreclosure by which the land is secured to him in absolute property, *or where there are separate jurisdictions*, the mortgagee may have some sort of pretence to *resort* to both to enforce his *rights*.

"But is there any sufficient reason why such an accumulation of suits should be tolerated under our system of jurisprudence, in which equity and law are incorporated with each other, and under our code of procedure, which abhors a multiplicity of suits? Could it be permitted for a moment *in this State*, that a mortgagee should simultaneously institute three different suits for the recovery of the same debt—one on the note; another to foreclose the mortgage, and a third to recover possession of the land itself; *although* it seems that this tri-partite division of the debtor to respond to the thrice repeated exactions of the creditor *is suffered in other States in which the jurisdictions of law and equity are still preserved separate and distinct?*"

The Court then proceeds to show that by the mode of procedure prescribed by the Texas Code for the foreclosure of mortgages, not only is there a decree or judgment that the land be sold, but a personal judgment

against the mortgagor which binds all of his other property.

And after referring to the fact quoted by Chancellor Kent, that the State of New York had, by statute, prohibited the mortgagee from bringing an action of ejectment, the Court adds:

"But there seems no necessity for a special provision to that effect by statute in this State. There is *but one jurisdiction, in which to bring suits,* and as a matter of course *it would not permit* a multiplicity of suits about the same subject-matter. Nor does there appear to be any necessity to abolish the action of ejectment when it has never been introduced or practiced; and the law affords a remedy so ample, comprehensive and perfect as *to legitimately exclude the idea that any other mode of redress could have been intended.*"

C. It will thus be seen—

1. That the Court, as well in its own language as when quoting from the decisions of the Courts and the remarks of elementary writers, distinctly recognizes that at law the legal title and right of the possession of the property mortgaged is in the mortgagee.

2. That where the two jurisdictions are separate and distinct, he may recover this possession by an action at law.

3. That this right is denied him in Texas, because there is no such distinction of the two jurisdictions, and but *one proceeding* is contemplated in this *one* Court, by their statute, which impliedly excludes any other, as this *one* Court would abhor a multiplicity of suits.

4. The right to the action for possession is not denied the mortgagee because his right and title are considered as any other in Texas than what they are considered by the accepted jurisprudence of the Supreme Court of the United States, Chancellor Kent, or other lights of the common law.

D. If any additional evidence be needed that the Texas Supreme Court recognizes the same relative rights existing in the mortgagor and mortgagee as are the accepted doctrine in the general jurisprudence of the common law, we refer to two other cases in that Court:

In 6 Texas, 113, Sampson & Keene vs. Williamson, a leading case, the Chief Justice says:

"In equity the mortgagor is considered the owner of the estate, and he possesses many of the incidents of ownership. But *at law* he is not regarded as the legal owner. Chancellor Kent, in his commentaries, defines a mortgage to be the conveyance of an estate by way of pledge, for the security of the debt, to become void on its payment. The *legal ownership* is vested in the *creditor.*"

And fully to the same point will be found the late case of Jordan vs. Peake, 38 Texas, 441, in which, in order to define the estate of the mortgagee, the Court, after quoting a number of decisions and text books, quotes from the decisions of this Court, as follows:

"A mortgage is a conveyance of the property, and *passes* it conditionally to the mortgagee. 2 Cranch, 358.

"A mortgage is not only a security for the debt, but it is something more. It is a *transfer* of the *property itself* as a security for the debt. 1 Peters, 441."

X.

As therefore, the estate of the mortgagee is in Texas recognized to be the same as that which this Court recognizes, and as the Courts of the United States have their common law side, as well as their equity side, and these are distinct, and as the appellant, as a citizen of Maryland, had a right to go into this forum instead of into the State Courts. When he went there, having, as he had, a legal title, he had an indisputable right to avail himself of all the rights which, *in that Court,* a legal title gives, viz: the right to bring an action for the possession of the mortgaged property after breach of condition, unless the fact that this mortgaged property was a homestead, debars him of this right.

XI.

Before considering this question, it may not be out of place to call attention, for a moment, to the mode of proceedure prescribed by the Texas statutes for the foreclosure of a mortgage.

By this (see Hartley's Digest, page 766, articles 2503, 2505) the mortgagee files his petition, stating the amount of his claim, and a description of the mortgaged property; whereupon summons issues for the mortgagor; and if he shows no cause to the contrary, a judgment goes against him for the amount of the mortgage debt, and for the sale of the mortgaged property. But if he comes in and makes defence, and de-

nies the correctness of the alleged indebtedness, he may have a jury to try these questions.

Independently of the fact that the statute prescribing this mode of procedure is one for the regulation of a Court that has mingled equity and common law powers, and so was not intended to apply to or interfere with the course of proceeding in the United States Courts, it is clear that the machinery here supplied would be entirely outside of that which prevails in the equity practice of the United States Courts.

(See 16 Howard, 674, Bennett vs. Butterworth.)

XII.

Does the fact that the mortgage to the appellant is of the homestead, debar him of his right to bring, in the Circuit Court of the United States, an action to recover the possession of the mortgaged property?

A. As the mortgage to the appellant bears date in May, 1873, the Constitution of the State of Texas then in force was the Constitution of 1869.

Article 12, section 15 of this Constitution (which will be found quoted in 31 Texas, page 677,) is as follows:

"Section 15. The Legislature shall have power, and it shall be their duty to protect by law from forced sale a certain portion of the property of all heads of families. The homestead of a family not to exceed two hundred acres of land, (not included in a city, town or village,) or any city, town or village lot or lost not to exceed $5,000 in value at the time of their destination as a homestead, and without reference to the

value of any improvements thereon, shall not be subject to forced sale for debts, except they be for the purchase thereof, for the taxes assessed thereon, or for labor and materials expended thereon; nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, and in such manner as may be prescribed by law."

With the exception of the amount of the *value* of the homestead in a city, town or village, this is substantially the same provision as that contained in the Constitutions of 1845 and 1866.

B. We have already shown that by the decisions of the Supreme Court of Texas, the right of the wife to "alienate" her homestead property, includes the power to mortgage it, and that the deed to appellant of May 2d, 1873, is duly executed and acknowledged—(see page 6 of this brief.)

C. The only question for discussion here then is, does the provision of the Constitution of Texas, which exempts the homestead from a *"forced sale,"* inhibit the institution of an action on the common law side of the Circuit Court of the United States, by the mortgagee, for the possession of the mortgaged homestead after default?

D. We have seen that the mortgagee has the right to maintain this action, unless this provision of the Constitution of Texas inhibits him. How can it have any such effect?

The action instituted by the appellant, (record, pages 8, 9, folios 21, 22,) in no way asks for, or proposes any

sale of the property, *forced* or of other kind. It is simply the resort to one of the long established *alternative* remedies of the mortgagee after default in the mortgage. So far from being an action for the *sale* of the property, which relief is had under *foreclosure* proceedings, it is the *opposite* or *alternative* remedy, viz: that of taking the property into possession, and applying the rents and profits to the liquidation of the debt.

2 Story Eq., section 1016.
14 Texas, 142, Hanway vs. Thompson.

E. And it is respectfully submitted that there is nothing in the decisions of the Texas State Courts to contravene this right.

The cases establish these propositions:

1. That if there is a mortgage of the homestead, with no power of sale to the mortgagee inserted therein, then the Court will not decree a sale, because a sale made under a decree of a Court is, in the judgment of the Texas State Court, a forced sale.

2. That if there is a power of sale inserted in the mortgage or deed of trust authorizing the trustee or mortgagee to sell on default, he may sell, and this is *not* a "forced sale."

It will suffice to cite two cases in support of the above.

6 Texas, 110, Sampson & Keane vs. Williamson.
38 Texas, 429, Jordan vs. Peak.

any cause for him to believe that his son was insolvent, beyond the fact that the son owed *him*. It will hardly be urged that a mere trespass by a son upon paternal kindness and forbearance in not exacting payment of a debt is any cause for the father to believe that his son is insolvent. Beyond that general fact there is no evidence in this record.

As to the second requisite, of knowledge by the respondent that a fraud on the act was intended by the alleged procurement, the evidence is all one way in his favor. He was a non-resident. His proceeding to collect his debt was not secret, but as open and notorious as such a proceeding can be; it was instituted against the entreaty and protest of the defendant, and conducted throughout in an adverse manner.

How can it be maintained that a responsive affidavit made in another suit, an affidavit which could have been compelled in the shape of a deposition, if Palmer, jr., had refused to give it for the benefit of his co-defendant, is such an act of procurement as the statute prohibits? And even if it was such an act of procurement as would have warranted an adjudication of bankruptcy against Palmer, jr., under one section of the act, as to Palmer, sr., the question remains, under the other section, whether he had reasonable cause to believe that Palmer, jr., was insolvent, and also knew that it was made to procure a seizure in fraud of the act.

Wilson vs. City Bank, 17 Wall., 473.
National Bank vs. Warren, 96 U. S., 539.

The decree should be affirmed.

C. K. DAVIS,
Counsel for Respondent, St. Paul, Minn.

OFFICE SUPREME COURT U. S.
FILED
OCT 30 1880
JAMES H. MCKENNEY, Clerk.

SUPREME COURT

OF THE

UNITED STATES.

NO. 333.

JOSIAS N. ROGERS,
Appellant,
vs.
ANDREW PALMER, SR.,
Respondent.

Supplemental Brief for Respondent.

C. K. DAVIS,
Counsel for Respondent.

J. W. Cunningham, Printer, St. Paul, Minn.

Supreme Court.

OF THE

UNITED STATES.

JOSIAS N. ROGERS, Assignee &c.,
Appellant,

vs.

ANDREW PALMER Sr.,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

The attachment in question was levied November 6, 1875, (p. 102 Record).

It is very important for us that the attention of the court be called to our error in citing in our first brief section 5128 R. S. The right of these parties depend upon the act of June 22, 1874, vol. stat. sect. 11, p. 180, which differs from sect. 5128 R. S., in this that the act of 1874 requires knowledge by the creditor that the seizure was made in fraud of the bankrupt act, while section 5,128 of the revised statutes requires only reasonable cause to believe that fact.

With this correction the case stands that in order to avoid the attachment or the execution, Palmer Jr., being insolvent, must have procured the attachment with the intent to give a preference to Palmer Sr., and the latter must have known that a fraud as the act was intended. The Circuit Court in its opinion (p. 12) puts its decision upon the ground that the testimony failed to show any act of procurement by Palmer Jr.

This act must, of course, have been done, if done at all, prior to the levy of the attachment on November 6, 1875. Whatever Palmer Jr. did after that date, is wholly immaterial to affect the rights of the attaching creditor, whose rights under his execution date from the time of the levy of the attachment by relation.

R. S. Minn., (1878) *chap.* 66, *sec.* 156, *p.* 730, provide that "if judgment is recovered by the plaintiff in such" (viz, a civil action,) "action the sheriff shall satisfy the same out of the property attached, if it is sufficient for that purpose."

Now there cannot be found in the record the least testimony of any act by which Palmer Jr. procured the writ to be brought, or the attachment or the execution levied.

But suppose this procurement proven, Palmer Sr. must be shown to have *known* (act from 1874 ante) that such attachment was made in fraud of the act.

Mays vs. Fritton, 20 *Wall.*, 414.
Clark vs. Iselin, 21 *Wall.*, 360

Actual personal knowledge by Palmer is not pretended. Nor can it be pretended that Lovely or Parker were at the time when the attachment or execution were levied the attorneys, general or special, of Palmer Jr. The testimony of the latter (p. 25, fol. 68,) fails to show that any such relation then existed between them.

Mr. Lovely (fol. 237, p. 96,) denies the existence of any

snch relation. So does Mr. Parker (fol. 242, p. 97, fol. 254, p. 101). Nor do facts as deposed by these gentlemen show any knowledge by them of the insolvency of the debtor when the attachment was levied. Nor is there any evidence that Palmer Sr. knew it. The only other claim of which Lovely & Parker had any knowledge, was a small demand in favor of Farrington & Smoll of about $600, and this demand Palmer Jr. asserted to them was not then due (p- 93, folio 230).

On November the 13th, 1875, execution was duly issued and levied in the suit which had been brought by Palmer Sr. On the day before, six days after the levy of the attachment. Palmer Jr. made an affidavit in the injunction suit, to which suit he was a party. This, as we have shown in another brief was not an act of procurement. He had protested against the bringing the suit by his father, and the levy of the writ of attachment.

His declarations made after this levy relied upon in p. 5 of the respondent's brief, are incompetent against the defendant.

C. K. Davis,
Counsel for Respondent.

St. Paul, Minn.

12-269

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 342.

JOSEPH S. FINCH AND JOHN W. PAINTER, PARTNERS UNDER THE FIRM OF JOSEPH S. FINCH AND COMPANY, APPELLANTS,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 2, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 342.

JOSEPH S. FINCH AND JOHN W. PAINTER, PARTNERS UNDER THE FIRM OF JOSEPH S. FINCH AND COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	6	3
Plea of limitation	7	3
Findings of fact and conclusions of law	8	4
Opinion of the court and dissenting opinion	26	21
Final judgment	37	32
Application for an appeal and order allowing same	38	32
Certificate	39	32

1 United States Court of Claims.

JOSEPH S. FINCH AND JOHN W. PAINTER, partners under the firm name of Joseph S. Finch & Co., vs. THE UNITED STATES. } No. 10265.

I. *Petition.—Filed January 27, 1875.—J. R.*

The petition of Joseph S. Finch and John W. Painter, partners composing the firm of Joseph S. Finch & Co., and doing business under the said firm name in the city of Pittsburg, county of Allegheny, and State of Pennsylvania, shows that they are citizens of the United States; that in the years 1868 and 1869 they were lawfully engaged in business as distillers in said city of Pittsburg, and as such were compelled to comply with the rules and regulations of the Commissioner of Internal Revenue applicable to such business.

Your petitioners show that under the 15th section of the act of Congress of March 2, 1867, "the Secretary of the Treasury is authorized to adopt, procure, and prescribe for use, such meters or other means for ascertaining the strength and quantity of spirits subject to tax, or for the prevention or detection of frauds by distillers of spirits, as he may deem necessary."

Your petitioners represent, that by sections 2 and 3 of the act of Congress of July 20, 1868, the Commissioner of Internal Revenue, "for the prevention and detection of frauds by distillers of spirits, is authorized to adopt and prescribe for use such hydrometers, saccharometers,
2 weighing and gauging instruments, or other means for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used, or to be used, in the production of spirits, and the strength and quantity of spirits subject to tax."

Your petitioners represent that, in accordance with said sections of the laws referred to, the Commissioner of Internal Revenue issued and published the following orders, regulations, and instructions, to wit: Special No. 54, dated April 19, 1867, announcing the adoption of meters for distilleries; Circular No. 63, dated April 26, 1876, styled regulations for supplying distillers with meters, and securing their proper attachment; Circular No. 69, dated September 16, 1868, styled notice of adoption of meters, and regulations for supplying distillers with same, and securing their proper attachment; Special No. 65, dated February 5, 1869, concerning application for meters, and Series 4, No. 5, dated March 30, 1869, styled regulations and instructions relative to Tice meters, under the act of July 20, 1868.

Your petitioners represent that the collector of internal revenue for the twenty-second district of Pennsylvania—the district in which petitioners' distilleries were situated—acting in his official capacity, and in accordance with the regulations hereinbefore recited, on or about the 9th day of October, 1869, demanded of your petitioners a deposit of money for meters for one of their distilleries, known as distillery No. 1, and notified your petitioners that unless said deposit was made he would proceed against said distillery in the manner provided in the regulations herein recited, and thereupon, acting on said notice and threat, your petitioners deposited with said collector, under protest, the sum of money demanded, to wit, two thousand dollars.

And your petitioners further show that on or about the 12th day of March, 1869, the collector for the twenty-second district of Pennsylvania demanded a deposit for meters for your petitioners' distillery, known as No. 4, and accompanied his demand with similar notice
3 and threat, as hereinbefore recited, when demand was made for distillery No. 1, and that, acting under said notice and threat, your petitioners, under protest, deposited with said collector the second sum demanded, to wit, two thousand one hundred and fifty dollars, ($2,150.)

Your petitioners represent that afterwards, to wit, some time in the month of December, 1868, and in the month of July, 1869, meters arrived for the respective distilleries, but that they remained uncared for and uninspected by any government officer; that they were never properly attached to their distilleries, or to the apparatus thereof, as contemplated by law, or as prescribed by regulations made thereunder.

Your petitioners represent that the Commissioner of Internal Revenue gave public notice in Circular 69, hereinbefore mentioned, "that the application for meters will be made on Form 7, as heretofore prescribed, which will be furnished by the collectors of the several districts," and further therein prescribed "that meters will be attached under the joint supervision of the manufacturer or his agent and of an assistant assessor, who will be specially detailed for that purpose by the assessor of the district, who will report the name of such assistant assessor to this office."

Your petitioners represent that they are informed and believe that no assistant assessor was ever officially detailed to supervise the attachment of meters to their distilleries, or either of them, and state as a fact that no notification of any such appointment or detail ever reached them; and state as a further fact that no assistant assessor ever did superintend the attachment of said meters, or to the adjustment thereof; and state as a further fact that no complete attachment or perfect adjustment of said meters was ever made; and furthermore that said meters were never used at either of their distilleries "for the prevention of fraud," or "for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used or to be used in the
4 production of spirits subject to tax," or have ever been used for that or any other purpose; and that they now are and always were valueless and useless.

Your petitioners represent that the Commissioner of Internal Revenue issued and published regulations known as Series 5, No. 5, dated June 7, 1870, acknowledging that the meters prescribed were unnecessarily expensive, and did not answer the purpose for which they were prescribed as well as the cheaper or sample meters; and afterwards issued and published his Circular No. 96, dated June 8, 1871, and therein officially announced that the meters prescribed were imperfect and ineffectual for the purposes for which they were adopted.

Your petitioners represent, that when the money hereinbefore set forth was by them paid to the collector of internal revenue for the twenty-second district of Pennsylvania, it was under the implied contract that the United States would supply, through said collector, merchantable and perfect meters for use in and about the distillery premises of petitioners, for the purposes set forth in the laws and regulations as hereinbefore recited, and of value equal to the amount deposited by petitioners with said collector; and furthermore, would detail an assistant assessor to superintend the attachment thereof; but herein defendants entirely failed to do and perform their part of said implied contract, whereby

they became liable to the claimant in the sum deposited with the said defendants' agent, to wit, four thousand one hundred and fifty dollars.

Your petitioners aver that neither the whole of said money, nor any part thereof, by them deposited with the collector of internal revenue for the twenty-second district of Pennsylvania, has been paid back to them, or to any one else for them, or has been allowed as a credit or offset by any officer or department of the United States to claimants, or to any one for them.

Your petitioners therefore pray judgment for the said sum of four thousand one hundred and fifty dollars, being the amount justly due them by the defendants.

JOSEPH S. FINCH & CO.

5 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

J. W. Painter, being duly sworn, deposes and says he is a member of the firm of Joseph S. Finch & Co., the above petitioners, and is the person described in and who signed the within petition; that there has been no assignment or transfer of the claim therein mentioned, nor of any part thereof, or any interest therein; that said claimants are justly entitled to the amount therein claimed, after allowing all just credits or offsets; and that he believes the facts stated in said petition to be true.

J. W. PAINTER.

Sworn to and subscribed before me this 19th day of January, 1875.
[L. S.] CLARK H. JOHNSON,
Notary Public.

Address of claimant: Pittsburg, Pa.
Address of attorney: O. S. Lovell, Washington, D. C.

6 II. *Traverse.—Filed March* 10, 1875.

And now comes the Attorney General, on behalf of the United States, and makes answer to the petition of the claimants herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimants in the sum of four thousand one hundred and fifty dollars, says that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

JOHN GOFORTH,
Assistant Attorney-General.

7 III. *Plea of limitation.—Filed January* 21, 1876.

Now come the defendants, by their Attorney-General, and say that the claimants herein should not further have or maintain their suit against the defendants, for the reason that the petition of the claimants was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney-General.

8 IV. *Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

1. In the years 1868 and 1869, and thereafter, the claimants were distillers, and had distilleries in Pittsburgh, Pa., in the then twenty-second internal-revenue collection-district, designated Nos. 1 and 4.

2. On the 9th and 23d of October, 1868, the claimants made application in writing (on printed blanks furnished and distributed by the Internal-Revenue Bureau), through the collector of said district, for meters for their said distillery No. 1, in the form and manner prescribed by the regulations of the Commissioner of Internal Revenue, and therewith made with said collector the deposit required by said regulations for the price of said meters, to wit, $2,050. Said applications were by the collector forwarded to the Commissioner, and by him transmitted to Isaac P. Tice, New York City.

The meters thus applied for were delivered by Mr. Tice December 19, 1868, but were never set up, as the distillery ceased to run long before any person went there to make the attachment.

The certificate of deposit for said $2,050 issued upon ordering said meters was mailed by the collector to Mr. Tice and the receipt thereof acknowledged by him.

3. On the 12th of March, 1869, the claimants made application in writing (on printed blanks furnished and distributed by the Internal-Revenue Bureau), through the collector of said district, for meters for their said distillery No. 4, in the form and manner prescribed by the regulations of the Commissioner of Internal Revenue, and therewith made with the collector the deposit required by said regulations for the price of said meters, to wit, $2,100.

Said application was by the collector forwarded to the Commissioner and by him transmitted to Isaac P. Tice, New York City.

The meters thus applied for were delivered by Mr. Tice July 26, 1869, and were set up and attached to distillery No. 4 about September 1, 1869, but never did work properly.

The certificate of deposit for said $2,100 issued upon ordering said meters was mailed and forwarded by the collector to Mr. Tice July 31, 1869, and the receipt thereof acknowledged by him.

4. No official report of the testing of said meters before shipment from the manufactory is found on the records of the office of the Commissioner of Internal Revenue. It does not appear that any officer of the Internal-Revenue Bureau was detailed to supervise the attachment of the meters or to test them after attachment, or that daily reports
9 by the storekeeper having charge of said distilleries, setting forth the indications as shown by the meters, at the hour of 12 meridian, for any ten consecutive (distillery) days, were made, or that meter indications were considered by the assessor in making his monthly computations of the product of said distilleries.

5. After the passage of the act approved July 20, 1868 (15 Stat. L., 125, chap. 186), the Commissioner of Internal Revenue adopted and prescribed for use at distilleries the spirit-meter invented by Mr. Isaac P. Tice, and made regulations and issued circulars and letters in relation thereto; of such parts of which as may be deemed material the following are copies:

A.

(Circular No. 69.)

OFFICE OF INTERNAL REVENUE,
Washington, September 16, 1868.

Notice is hereby given that the Commissioner of Internal Revenue has adopted and prescribed for use in distilleries the spirit-meter invented by Mr. Isaac P. Tice, of New York, being the same that was adopted and prescribed by the honorable Secretary of the Treasury on the 19th of April, 1867, under section 15 of the act of March 2, 1867, and subsequently recommended for use by the commission appointed under the joint resolution of Congress approved February 3, 1868.

Section 3 of the act of July 20, 1868, provides that whenever the Commissioner of Internal Revenue shall adopt and prescribe for use any meter, every owner, agent, or superintendent of a distillery must furnish and attach, at his own expense, such meter for use at his distillery, and furnish all pipes, materials, labor, and facilities necessary to complete such attachment in accordance with the regulations of the Commissioner of Internal Revenue, who is also authorized to order and require such changes of or additions to the distilling-apparatus, connecting-pipes, pumps, or cisterns, or any machinery connected with or used in or on the distillery premises, and prescribe such fastenings, locks, and seals as he may deem necessary.

The system which has been adopted involves the use of two meters; the first with double counters at the end of the worm through which the entire product of the still will pass, the quantity of high wines being indicated upon one set of registers and the quantity of low wines upon another. The second meter will be placed upon the doubler in such position as to register the quantity of low wines carried back to the doubler for redistillation. If the still is provided with such attachments that no low wines are discharged, and the distiller is prepared to report as taxable the entire product of the still, the second meter will not be required.

These meters are constructed of six different sizes, the prices and capacities being as follows:

Sample-meter A	$200
Sample-meter B	250
Meter No. 1.—Single counter	450
Double counter	500
Capacity, one and a half gallons per minute.	
Meter No. 2.—Single counter	600
Double counter	650
Capacity, three gallons per minute.	
Meter No. 3.—Single counter	800
Double counter	850
Capacity, six gallons per minute.	
Meter No. 4.—Single counter	1,000
Double counter	1,050
Capacity, eighteen gallons per minute.	

10 The small meters, A and B, are intended more especially for application to small copper stills, and the capacity above given must be understood to be the maximum capacity per minute of each of the meters.

The meter adopted, being the invention of Mr. Tice, and secured to him by letters patent, can only be made by him or under his license; and, in order to guard against an unreasonable price being demanded of those who are bound by law to purchase it, the prices of the several sizes, under an arrangement made between Mr. Tice and the government, have been determined by a committee, consisting of William T. Duvall, of Georgetown, D. C.; William P. Trowbridge, of New York; and S. J. Knowles, of Massachusetts, all practical and skillful machinists, two of whom were designated by the government and one by Mr. Tice, and the sums hereinbefore named are the prices agreed upon by them for the meters delivered at the place of manufacture, as stated in the report of that committee.

Mr. Tice reports that he has now on hand, finished and ready for delivery, one hundred and seventeen meters, with thirty-six others in an advanced state, which will soon be ready for delivery, and has no doubt that he will be able to deliver meters as fast as they may be ordered, and as fast as distillers shall become authorized to run under the new law.

Under the provisions of section 3 distillers are required to procure and attach such meters, and in making their applications therefor they must state the capacity of the still in cubic feet, and its utmost possible producing-capacity per minute; that is, the greatest possible quantity of spirits that will pass from the worm in that time.

The producing-capacity here referred to must not be confined to high wines merely, but must show the entire quantity of spirits, whether high or low wines, which can pass from the worm in the time specified. The attention of distillers is especially called to this point, as the discharge from the worm is not uniform, and if the meter is not of sufficient capacity to measure and pass the largest quantity which the worm can discharge it will be flooded, and its operations thereby stopped, until the meter is opened and again placed in working order.

The application must also show the cubic contents of the doubler, the outside diameter of the worm at its lower extremity, the height and diameter of the tank in which it is placed, and the material of which the still, doubler, and tank are constructed. The diameter of the main pipe leading from the still to the doubler, as well as of the charging and discharging and blow-off pipes, including the pipe used for discharging the doubler, must also be given. There is also required a description of the foundations upon which the still, doubler, and condenser are respectively supported. If the still is provided with collapse-valves, their number and diameter must also be stated.

This application will be made on Form 7 as heretofore prescribed, which will be furnished by the collectors of the several districts. At the time of making the application the applicant will furnish to the collector of his district a certificate of deposit in a United States depository for the amount of the price of the meter or meters, payable to the order of Mr. Tice, and the collector will certify upon such application that he has received such certificate, and forward the application to this office for transmission to Mr. Tice. And the applicant should also state the means of access to the distillery, whether by railroad, steamboat, or canal, and with what points the distillery is connected by either of these modes of communication. If there is any person carrying on the trade of coppersmith in the immediate vicinity the collector will state the fact; and if not, he will state the distance to the nearest point at which the services of such artisan can be procured.

Upon the delivery of the meter to the distiller, the collector will

11 at once transmit the certificate of deposit to Mr. Tice, at his address. 314 Third avenue, New York City.

Meters will be attached under the joint supervision of the manufacturer, or his agent, and of an assistant assessor, who will be specially detailed for that purpose by the assessor of the district, who will report the name of such assistant to this office.

The expenses of transportation and attachment of the meters, and of any changes required to be made in the distillery, are to be paid by the distiller.

So long as meters are ready for delivery distillers must procure and attach them. Should any distiller refuse to procure and attach a meter, it will be the duty of the collector to close the distillery, and forthwith institute the proper proceedings for its condemnation and the enforcement of the penalties as provided by law.

Immediately upon the receipt of these instructions, collectors will report to this office the number and location of all the distilleries in operation in their respective districts, with the names of the owners; and thereafter, when any distiller shall commence business, the fact will be immediately reported to this office.

Distillers of apples, peaches, and grapes, exclusively, will not be required to furnish and attach meters to their distilleries.

E. A. ROLLINS.
Commissioner.

B.

OFFICE OF INTERNAL REVENUE,
Washington, September 16, 1868.

SIR: Having decided to adopt and prescribe the meter invented by you for use in distilleries, you are hereby directed to proceed with their construction, provided you are willing to do so upon the following conditions:

First. Samples of the meters A and B, and of the single and double counter meter, will be kept, and such set of meters will be tested and compared with the sample, by an officer detailed for that purpose, before being removed from the factory, and again after being finally attached to the distillery; and if any meter, upon being so attached, shall prove to be defective in any respect, the defective part shall be replaced or a new meter furnished without additional expense to the distiller.

Second. Public notice will be immediately given of the adoption of the meter, and distillers will be required to procure and attach them to their distilleries as fast as they can be delivered and attached, until all are supplied.

Third. The one hundred and seventeen (117) meters now finished will be immediately made ready for delivery, and the thirty-six (36) now in process of manufacture will be completed as soon as possible. The manufacture of others, to the number of five hundred (500) in all, is to be proceeded with as rapidly as possible, and thereafter not more than twenty sets are to be in process of construction at one time, unless a greater number is directed by the Commissioner of Internal Revenue.

Fourth. The Commissioner reserves to himself or his successor in office the right at any time to adopt any improvement of the meter or system, or to revoke the order adopting the meter, and to direct on the part of the government a discontinuance of its manufacture.

Fifth. You are to furnish the meters in good order and condition,

ready for transportation, at the prices fixed by the committee, which are as follows:

12 * * * * * * *

The cost of transportation, and expense of attaching the same, to be paid by the distiller.

Sixth. The attachment of the meters is to be made under your direction, and also under the supervision of the officer to be detailed under the regulations, and after the final attachment and closing of the meter the working of the overflow-valve is to be tested by flooding the meter.

Seventh. You are to report to this office at the end of each week the number of meters that have been delivered, and to whom the same were shipped, and the number on hand ready for delivery.

Very respectfully,

E. A. ROLLINS,
Commissioner.

ISAAC P. TICE, Esq.,
New York, N. Y.

C.

OFFICE OF INTERNAL REVENUE,
Washington, January 8, 1869.

SIR: You will forward no certificates of deposit in payment for meters delivered until the meters are attached to the distilleries, and in future you will take the certificate of deposit in your own name, changing those which have been already taken, if you can do so.

Please report, in detail, amount of certificates already sent.

Very respectfully,

E. A. ROLLINS,
Commissioner.

This letter was addressed and sent to the collectors of all internal revenue districts.

D.

OFFICE OF INTERNAL REVENUE,
Washington, January 20, 1869.

SIR: In the adoption of the meter it was intended that some person should be stationed at the manufactory, or should have it in charge, to test every meter before it was sent out. Hitherto all attempts to have certain persons designated for that purpose have failed, and I

13 now desire that you will take it upon yourself to thoroughly test every meter before it leaves the manufactory of Mr. Tice, and that none shall be sent unless you are satisfied with its completeness under such test as you may subject it to. I desire that you will enter upon this employment immediately, and from time to time report the results to this office.

Very respectfully,

E. A. ROLLINS,
Commissioner.

WM. WHEATON, Esq.,
Care Collector Field, New York.

E.

[Series 3, No. 4.]

OFFICE OF INTERNAL REVENUE,
Washington, February 5, 1869.

The attention of collectors of internal revenue and of distillers is called to the provisions of the law and the regulations in relation to the procurement and attachment of meters.

Examination in many cases has shown that the meters applied for by distillers are too small in capacity for the distillery. In Circular No. 69 distillers, in making their application, are directed to state the utmost possible producing capacity of the still per minute, "that is, the greatest possible quantity of spirits that will pass from the worm in that time. The attention of distillers is especially called to this point, as the discharge from the worm is not uniform; and if the meter is not of sufficient capacity to measure and pass the largest quantity which the worm will discharge it will be flooded, and its operation thereby stopped until the meter is opened, and the valve again placed in working order."

* * * * * * * * *

Distillers should be at once required to revise their applications for meters, and where the meters are too small, or only one is applied for when two are required, the applications should be at once corrected. If not so done, it will be understood that the distillers propose to stand upon their applications as made, and that they will take the entire responsibility as to the meters ordered by them being of sufficient capacity; and, where only one meter is applied for, that they assent to being taxed for the low as well as the high wines. All revenue officers will govern themselves accordingly. The manufacturer of the meters will be instructed to forward the meters of the sizes applied for, and to attach the same; and if any trouble arises on this account, the distiller, having been furnished with the precise size he asked for, will have no reason to complain of any one but himself.

A daily report must be made by the store-keeper in charge of each distillery to the assessor of the district, setting forth the indications shown by the meter at the hour of twelve meridian. And each assistant assessor who has a distillery in his division will examine each meter whenever he visits the distillery, and report to his assessor the indications of the meter as above directed. And assessors, in making their monthly computation on Form 89, will use the information thus given in determining the required production. Where but one meter is attached, they will charge the distiller with the full product of the worm, making no deduction for low wines returned to the still or doubler.

* * * * * * * * *

Where meters had been delivered prior to the receipt of the instructions of January 8, collectors will promptly forward to Mr. Tice the certificates of deposit therefor, and measures will be taken to have them attached.

14 Where collectors deposit their collections in a depository bank, the meter deposits will be made in such bank; but where they are required to deposit collections with an assistant treasurer or designated depositary, the meter deposits will be made in some responsible bank.

E. A. ROLLINS,
Commissioner.

F.

[Special No. 65.]

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, March 30, 1869.

I. AS TO PROCURING AND ATTACHING METERS.

On the 16th of September, 1868, the Commissioner of Internal Revenue adopted and prescribed for use in distilleries the spirit-meter invented by Mr. Isaac P. Tice, of New York, being the same that was adopted and prescribed by the Hon. Secretary of the Treasury on the 19th of April, 1867, under section 15 of the act of March 2, 1867, and subsequently recommended for use by the commission appointed under the joint resolution of Congress approved February 3, 1868.

Section 3 of the act of July 20, 1868, provides that whenever the Commissioner of Internal Revenue shall adopt and prescribe for use any meter, every owner, agent, or superintendent of a distillery must furnish and attach, at his own expense, such meter for use at his distillery, and furnish all pipes, materials, labor, and facilities necessary to complete such attachment in accordance with the regulations of the Commissioner of Internal Revenue, who is also authorized to order and require such changes of or additions to the distilling-apparatus, connecting pipes, pumps, or cisterns, or any machinery connected with or used in or on the distillery premises, and prescribe such fastenings, locks, and seals as he may deem necessary.

The system which has been adopted involves the use of two meters. The first will be attached to the end of the worm and will register the entire product of the still; the second will be placed upon the doubler in such position as to register the quantity of low wines carried back to the doubler for redistillation. If the still is provided with such attachments that no low wines are discharged, and the distiller is prepared to report as taxable the entire product of the still, the second meter will not be required.

These meters are constructed of six different sizes, the prices and capacities being as follows:

* * * * * * * * *

The meter adopted being the invention of Mr. Tice, and secured to him by letters patent, can only be made by him or under his license; and in order to guard against an unreasonable price being demanded of those who are bound by law to purchase it, prices of the several sizes, under an arrangement made between Mr. Tice and the government, were determined by a committee, consisting of Wm. T. Duvall, of Georgetown, D. C.; Wm. P. Trowbridge, of New York; and S. J. Knowles, of Massachusetts, all practical and skillful machinists, two of whom were designated by the government and one by Mr. Tice, and the sums hereinbefore named are the prices agreed upon by them for the meters delivered at the place of manufacture, as stated in the report of that committee.

Under the provisions of section 3 of the act July 20, 1868, distillers are required to procure and attach such meters, and in making their applications therefor they must state the capacity of the still in cubic feet and its utmost possible producing capacity per minute; that
15 is, the greatest possible quantity of spirits that will pass from

the worm in that time. The producing capacity here referred to must not be confined to high wines merely, but must show the entire quantity of spirits, whether high or low wines, which can or will pass from the worm in the time specified. The attention of distillers is especially called to this point, as the discharge from the worm is not uniform; and if the meter is not of sufficient capacity to measure and pass the largest quantity which the worm will discharge it will be flooded, and its operation thereby stopped, until the meter is opened and the valve again placed in working order.

The application must also show the cubic contents of the doubler, the outside diameter of the worm at its lower extremity, the height and diameter of the tank in which it is placed, and the material of which the still, doubler, and tank are constructed.

* * * * * * *

This application will be made on form 7, as heretofore prescribed, which will be furnished by the collectors of the several districts. At the time of making the application the applicant will furnish to the collector of his district a certificate of deposit in a United States depository for the amount of the price of the meter or meters, payable to the order of Mr. Tice, and the collector will certify upon such application that he has received such certificate, and forward the application to this office for transmission to Mr. Tice. And the applicant should also state the means of access to the distillery, whether by railroad, steamboat, or canal, and with what points the distillery is connected by either of these modes of communication. If there is any person carrying on the trade of coppersmith in the immediate vicinity, the collector will state the fact; and, if not, he will state the distance to the nearest point at which the services of such artisan can be procured. Upon the receipt of the bill of lading the collector will at once transmit the certificate of deposit to Mr. Tice, at his address, 314 Third avenue, New York City.

The expenses of transportation and attachment of the meters, and of any changes required to be made in the distillery, are to be paid by the distiller.

The distillers must furnish all lumber and other materials necessary for the attachment of the meter, and such workmen and assistants as may be required. The attachment will be made in such manner as to interfere as little as possible with the operation of the distillery; but in case the distiller neglects promptly to provide the materials and assistance required, or in any way attempts to delay or defeat the attachment, it will be the duty of the collector of the district to close the distillery until the meters are attached.

Where meters are being attached to several neighboring distilleries at the same time, the expenses incurred by Mr. Tice and his employés will be apportioned among the several distilleries according to the time employed in each.

* * * * * * *

Distillers should be at once required to revise their applications for meters, and where the meters are too small, or only one is applied for when two are required, the applications should be at once corrected. If not so done, it will be understood that the distillers propose to stand upon their applications as made, and that they will take the entire responsibility as to the meters ordered by them being of sufficient capacity; and, where only one meter is applied for, that they assent to being taxed for the low as well as the high wines. All revenue officers will govern themselves accordingly. The manufacturer of the meters will

be instructed to forward the meters of the sizes applied for, and
16 to attach the same; and, if any trouble arises on this account, the distiller, having been furnished with the precise size he asked for, will have no reason to complain of any one but himself.

Meters will now be delivered as fast as the corrected applications are received, and the manufacturer will proceed with their attachment as fast as possible. Collectors should at once notify all distillers who have not made application to do so immediately, and will report to the Commissioner the names of such as refuse or neglect to make such application. Whenever a certificate of deposit is forwarded to Mr. Tice, the collector will report the fact to this office, giving the amount, and name of the distiller who made the deposit.

When collectors deposit their collections in a depository bank, the meter deposits will be made in such bank; but where they are required to deposit collections with an assistant treasurer or designated depositary, the meter deposits will be made in some responsible bank.

A daily report must be made by the storekeeper in charge of each distillery to the assessor of the district, setting forth the indications shown by the meter at the hour of 12 midnight, or at the time when the distillery ceases to operate for the day. And each assistant assessor who has a distillery in his division will examine each meter whenever he visits the distillery, and report to his assessor the indications of the meter as above directed; and assessors, in making their monthly computation on form No. 89, will use the information thus given in determining the production. Where but one meter is attached, they will charge the distiller with the full product of the worm, making no deduction for low wines returned to the still or doubler.

* * * * * * *

Under the provisions of the law the distiller is required to furnish and attach meters at his own expense, and also to furnish all pipes, materials, labor, and facilities necessary to complete such attachment. The first duty of a distiller is, of course, to procure a meter. The manufacturer is not required to furnish the meters on credit, and ought not to be expected to do so. When he ships a meter to a distiller, in accordance with the application, the manufacturer is entitled to the pay for it. The law does not require the manufacturer to attach it, but, on the contrary, requires the distiller to attach at his own expense. Wherever changes are required in a distillery to facilitate the attachment, such changes must be made by the distiller. In order that the attachment may be made correctly and the meters properly adjusted, the manufacturer or some of his own workmen are required to superintend the attachment. When the distiller is notified by the manufacturer or his agents what changes are necessary, and what materials or assistance are required, he should furnish them promptly. It will be the duty of collectors to see that they do so, and in case of any unreasonable delay to close the distilleries until the attachment is completed.

Wherever it is practicable an officer detailed by the Commissioner will supervise the attachment, and when no such detail is made the assessor will detail one of his assistants for that purpose. When the attachment of a meter is completed, it must be promptly reported to this office by such officer or assistant assessor. The presence of such officer, however, will not be understood as relieving either the collector or assessor of the district from the responsibility properly belonging to them.

A strict compliance with these instructions will be required of all officers of internal revenue. Whenever the manufacturer or his agents commence the attachment of meters in any district, the officers of such

district are required to afford them every aid in their power, in order that the work may be completed as soon as possible. If there is
17 any delay on the part of the distiller, or if any obstacles are interposed by him, or the manufacturer or his workmen fail to do their duty, prompt report must be made to this office.

All must understand that the requirements of the law in relation to meters and their attachment will be rigidly enforced.

II.—COMPUTATION OF QUANTITY OF PROOF-SPIRITS.

* * * * * * * *

III.—TESTING METERS WHEN ATTACHED TO A DISTILLERY.

* * * * * * * *

The officer should see to the measurement personally, as well as to obtaining the average proof of each run.

C. DELANO,
Commissioner.

G.

OFFICE OF INTERNAL REVENUE,
Washington, April 6, 1869.

SIR: You are hereby detailed for the purpose of testing spirit-meters at the manufactory of Mr. Tice, previous to their delivery, and at such other places as you may be directed by this office.

You will, from time to time, make reports of your action to this office; and, in examining or testing any meters in New York or Brooklyn, you will act under the advice and direction of the supervisor in the absence of any definite instructions from this office.

Very respectfully,

C. DELANO,
Commissioner.

HENRY HILL, Esq.,
Care of Supervisor Dutcher, New York City.

H.

(Series 5, No. 5.)

OFFICE OF INTERNAL REVENUE,
Washington, June 7, 1870.

Experience having shown that the automatic meters heretofore in use at distilleries are unnecessarily expensive, and do not so well answer the purpose for which they were designed as the cheaper and better sample-meters, or automatic meters adapted for use as sample-meters, and that the use of the second or "credit" meter may be beneficially dispensed with, it is hereby ordered that hereafter the use of all meters, except said sample-meters or automatic meters, adapted for use as sample-meters, be, and is, discontinued; and that hereafter one meter only shall be required for each distillery, which shall be attached in such a way as that all the spirits produced at such distillery, after the manufacture thereof is complete, shall pass through such meter; and every owner, agent, or superintendent of a distillery is hereby required, within

ninety days, to remove from his distillery the meters, the use of which is hereby discontinued.

The meters known as sample-meters, and the automatic meters adapted for use as sample meters, invented by Isaac P. Tice, are hereby adopted and prescribed for use at distilleries; and every owner, agent, or superintendent of a distillery is required, within ninety days, to furnish and attach, at his own expense, such meters, of proper size, construction, and capacity, for use at his distillery, and to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment in accordance with these regulations.

18 In order to adapt automatic meters 2, 3, 4, and 5 for use as sample-meters, it will be necessary for the distillers to have the tipping cans hung anew, and a sample receiver provided in the bottom of the meter-box, the same as in the sample meters A and B; or to have a cylindrical vessel of copper, large enough to hold the reserves of a ten days' running period, inclosed in a wooden case, attached to the side of the meter-box in close connection, for the purpose of receiving samples. This vessel will be constructed and attached in accordance with directions and a drawing to be supplied to collectors from this office. The outlet, for drawing off the sample-reserves for subsequent use in the ascertainment of temperature and average strength, must also be, as in A and B, by faucet and lock.

Until this attachment is made, when only high wines are passed through the meter, the average strength of spirits for the meter-report will be ascertained by the hydrometer and the thermometer from the spirits in the cistern each time of drawing off.

The meters hereby discontinued, being the property of the distillers, may be by them sold, to be adapted for use as sample-meters. On removing the pipes connecting the "credit" meter (now discontinued) at the doubler with the "debit" meter at the worm, all openings must be effectually closed, as provided in section 16 of the act of July 20, 1868.

Any meter hereafter adopted and prescribed by the Commissioner of Internal Revenue for attachment and use in distilleries, as well as the sample-meters and automatic meters adapted for use as sample-meters hereby prescribed, must be attached and adjusted under the supervision of officers detailed by the Commissioner; the understanding being that neither the Government of the United States, nor any department or officer thereof, incurs any liability for or on account of said meters, or the attachment, adjustment, or repair thereof.

Whenever any owner, agent, or superintendent of a distillery shall have procured a meter for use at his distillery, and shall be prepared to have the same attached for use, he shall notify the collector of the district thereof; and shall, in such notice, also state the capacity in each still in his distillery in cubic feet, and the utmost possible producing capacity thereof per minute; that is, the greatest possible quantity of spirits that can pass from the worm in that time.

* * * * * * *

The distiller, in applying to the manufacturer or other person for a meter, should show the cubic contents of the doubler, the outside diameter of the worm at its lower extremity, the height and diameter of the tank in which it is placed, and the material of which the still, doubler, and tank are constructed. The diameter of the main pipe leading from the still to the doubler, as well as of the charging and discharging and blow off pipes, including the pipe used for discharging the doubler, must also be given, together with a description of the foundations upon which the still, doubler, and condenser are respectively supported. If the still

is provided with collapse-valves, their number and diameter must also be stated.

Each meter must be attached to the tail-pipe of the worm. When a separation of high and low wines is made, a separator must be placed between the worm and the meter, the high wines only passing through the meter, the low wines being carried directly to the low-wine receiver or the doubler. When, by the process of distillation, no high wines are produced, no separator is required, and the entire quantity of the singlings will pass through the meter for registering weight of volume and depositing a sample for strength.

19 A daily report must be made by the storekeeper in charge of each distillery to the assessor of the district, setting forth the indications shown by the meter at the hour when the distillery ceases to operate for the day. He must, at the time of taking the meter indications, draw off the entire contents of the sample receiver, when attached, and ascertain and report the true per cent. thereof. And each assistant assessor who has a distillery in his division will examine each meter whenever he visits the distillery, and report to his assessor the indications of the meter, as above directed. And assessors, in making their monthly computation on Form No. 89, will use the information thus obtained in determining the quantity produced.

The storekeeper will also ascertain and report to the assessor the average strength of the spirits in the receiving-cisterns at each time of drawing off. This information will be embodied in his meter report.

The following form will be used in making reports of the indications of meters. The names, dates, and figures must be filled in with the pen.

The formula for the computations is as given below:

METER REPORT.

* * * * * * *

DIRECTIONS FOR TESTING METERS WHEN ATTACHED TO A DISTILLERY.

* * * * * * *

The officer detailed should see to the measurement personally, as well as to obtaining the average proof of each run.

These rules, regulations, and orders supersede all former regulations and instructions upon the same subject, and will be enforced until changed by competent authority.

C. DELANO,
Commissioner.

I.

(Circular No. 96.)

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, June 8, 1871.

Under authority conferred by sections 2 and 3 of the act of July 20, 1868, the Commissioner of Internal Revenue, in Circular No. 69, dated September 16, 1868, and, again, in regulations, "Series 5, No. 5," dated June 7, 1870, adopted and prescribed for use in distilleries spirit-meters

invented by Mr. Isaac Tice, the same having been adopted and prescribed by the Hon. Secretary of the Treasury on the 19th day of April, 1867, and subsequently recommended for use by the commission appointed under the joint resolution of Congress approved February 3, 1868.

It having been ascertained by experience that these meters, as a class, do not fully answer the purpose for which they were intended, their use is hereby discontinued, and all existing orders prescribing the same are hereby revoked. All meters attached to distilleries may be detached.

The meters being the property of distillers, they will be permitted to dispose of them as they may desire.

A. PLEASONTON,
Commissioner.

At the request of the claimants the following letters, circulars, and documents are added to the findings:

20 K.

(Issued before the passage of the act of July 20, 1868, ch. 186, under act of March 2, 1867.)

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, April 17, 1867.

SIR: The Secretary of the Treasury having decided to adopt the meter invented by you, and to prescribe the same for use in distilleries, you are hereby directed to proceed with their construction, provided you are willing so to do, upon the following conditions:

First. Each set of meters will be tested by an officer detailed for the purpose before being removed from the factory, and again after being finally connected with the distillery, and no meter will be accepted which is not found to work satisfactorily when subjected to these tests.

Second. Public notice will be immediately given of the adoption of this meter, and distillers will be required to make application to the collector as required by the statute, and to furnish adequate security for payment for such meter in the event of its being supplied, and as soon as the number thus making application can be ascertained you shall be advised.

Third. You will proceed immediately with the construction of the first set of meters, which shall be of such dimensions as to be suitable for use in a distillery of the medium capacity, for which it is intended to provide, and as soon as the same shall be completed and inspected, which shall be attached to a distillery to be designated by this office, and which shall be as near the place of manufacture as can be conveniently selected, and if at the end of one month from the time it is attached to the distillery there shall not have appeared sufficient reason for the government to decline the further use of the meter or system, the meter will be accepted, and the distiller will be required to pay for the same. Pending this trial, you will be at liberty to proceed with the construction of other meters, provided it is clearly understood that in the event of the failure of the experiment above required with the first meter, you shall not be entitled to any pay, or to any claim upon the government, for any expenses which you may have incurred.

Fourth. The Secretary of the Treasury holds himself at liberty at any time to adopt any improvement or modification of the meter or system, or at any time to revoke the order adopting the meter and to discon-

tinue their manufacture on behalf of the government. If the first meter shall prove successful when subjected to the tests above set forth, and the government shall subsequently revoke the adoption of the meter and order a discontinuance of proceedings, you will be paid such sum as may be determined upon in the manner hereinafter stated for all instruments which you may have completed or have in process of completion at the time of such revocation, provided that at no time shall you have more than twenty sets in process of manufacture at any one time unless direction shall be given hereafter for the manufacture of a larger number.

21 Fifth. Three competent persons shall be selected, one by the Secretary of the Treasury, one by the Commissioner of Internal Revenue, and one by yourself, who shall together examine into the actual cost of the construction of the meter, including interest on necessary outlay and the cost of attaching the same to a distillery, and who shall also determine what amount shall be added to such cost in order to furnish a proper remuneration for the invention and manufacture of the meter. When the price of the first meter is thus determined, it shall form the basis for a price of other meters of similar capacity until such time as a re-examination shall be made, which may be done at any time at the instance either of the government or of yourself. It is understood that in every case the expense of transportation and of attaching and of superintending the attachment of the meter will be added to the price fixed upon, as at the place of manufacture.

Sixth. If any distiller who has made application for a meter shall fail to put his distillery in operation immediately after the meter is attached, so that it will be impossible to test the meter in actual operation, or shall decline to have it affixed upon completion, he will be required to pay for the meter precisely as if it had been tested and found to work successfully. The meter will then be tested whenever the distillery commences operations, and if not found to work satisfactorily the distiller will be compelled to suspend operations until the defect is cured, at his expense.

Very respectfully,

E. A. ROLLINS,
Commissioner.

ISAAC P. TICE, Esq.,
New York City.

Approved.

H. McCULLOCH,
Secretary of Treasury.

APRIL 18, 1867.

L.

The printed form referred to in findings 2 and 3, and the same specified in Form 7 of the regulations, as follows, is inserted at the request of both parties:

UNITED STATES INTERNAL REVENUE.

Form of application by distillers for a meter.

, 186 .

Application is hereby made by for a meter, to be attached to distillery, at , county of , and State of ; and he hereby declare that the following statement relative to

distillery is accurate in every particular, viz: That the still is made of ; that the doubler is made of ; that the still has chambers; that the greatest capacity for production during 24 hours is gallons; that the greatest discharge of gallons per minute, when working with greatest rapidity, is gallons; that the material used for distillation is ; that the exact outside diameter of the worm at its lower extremity is inches; that the diameter of the main pipe from still to doubler is inches; that the diameter of charging-pipe is inches; that the diameter of the discharging or blow-off pipe is inches; that the diameter of the pipe used for discharging the doubler is inches; that the dimensions of the still are feet inches by feet inches; that the dimensions 22 of the doubler are feet inches by feet inches; that the height of the worm-tank is feet inches, and the inside mean diameter is feet inches; that the stills are supported by a foundation; that the number of collapse-valves is ; and that the diameter of each is .

(Signed) .

To ,

Collector district of .

NOTE.—Any misstatement in regard to any of the above points may lead to extra expenses and delay at the time of the attachment of the meter, therefore extreme caution is indispensable.

When it is possible, state the street and number of the distillery.

M.

(Special No. 54.)—Issued under the act of March 2, 1867.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, D. C., April 19, 1867.

Notice is hereby given, that the Secretary of the Treasury has adopted and prescribed for use in distilleries a meter invented by Mr. Isaac P. Tice, of New York, and that regulations for the use of such meter will be issued in a few days.

Each collector will notify every distiller who applies to make payment of the special tax for the year ending May 1, 1868, that he will not be allowed to continue in operation after the 15th day of May, unless he shall before that time have made application for a meter, and accompanied his application with adequate security for the payment of the necessary expense, which will probably vary, according to the size of the distillery, from $600 to $1,500.

E. A. ROLLINS,
Commissioner.

N.

(Circular No. 63.)—Issued under act of March 2, 1867.

Regulations for supplying distilleries with meters, and securing their proper attachment.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, April 26, 1867.

Under the fifteenth section of the act approved March 2, 1867, the Secretary of the Treasury is authorized to adopt, procure, and prescribe

for use such meters or other means for ascertaining the strength and quantity of spirits subject to tax, or for the prevention or detection of frauds by distillers of spirits, as he may deem necessary; and under this authority the Secretary has adopted and prescribed for use the meter and system of attaching the same invented by Mr. Isaac P. Tice, of New York.

The statute further provides that whenever the Secretary of the Treasury shall adopt and prescribe for use any meter or meters, it shall be the duty of every owner, agent, or superintendent of a distillery to make application to the collector of his district for such meter or meters, to be used in his distillery; and the same shall be furnished and attached to the distillery at the expense of the distiller, whose duty it shall be to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment, in accordance with the
23 regulations of the Commissioner of Internal Revenue, who is further authorized to order and require such changes of or additions to distilling-apparatus, connecting-pipes, pumps, or cisterns, or any machinery connected with or used in or on the distillery premises, or may require to be put on any of the stills, tubs, cisterns, pipes, or other vessels, such fastenings, locks, or seals, as he may deem necessary.

The system which has been adopted involves the use of a double meter at the end of the worm through which the entire product of the still will pass, the quantity of high wines being indicated upon one register and the quantity of low wines upon another. The second meter will be placed upon the doubler in such a position as to register the quantity of low wines carried back to the doubler for redistillation. If the still is provided with such attachments that no low wines are produced, and the distiller is prepared to report as taxable the entire product of the still, the second meter will not be required.

Meters will be constructed of different capacities, the smallest ones being suitable for use in distilleries where the most rapid flow of spirits cannot exceed four gallons per minute, and the largest, which it is now proposed to construct, having a capacity for measuring forty gallons per minute, and there will be two intermediate sizes.

An arrangement has been made with the inventor, under which he undertakes to furnish the meters at prices to be determined by a committee of three persons, two of whom are to be designated by the government and one by himself. It is believed that the price of the set of instruments, when completed at the factory in New York, will be not more than six hundred dollars for each pair of the smallest capacity, and eight hundred, ten hundred, and twelve hundred dollars for pairs of the other three sizes, respectively.

Every owner of a distillery, in making his application to the collector of his district for a meter, must state the capacity of his still in cubic feet, and the utmost possible producing-capacity per hour. The producing-capacity here referred to must not be confined to high wines merely, but must show the entire quantity of spirits, whether high or low, which can be produced from the still within the time specified. The application must further show the cubic content of the doubler, and the outside diameter of the worm at its lower extremity, the height and diameter of the tank in which it is placed, and the material of which the still, doubler, and tank are constructed. The diameter of the main pipe leading from the still to the doubler, as well as of the charging and discharging or blow-off pipes, including the pipe used for discharging the doubler, must also be given. There is also required a description of the foundations upon which the still, doubler, and condenser are respectively sup-

ported. If the still is provided with collapse-valves, their number and diameter must also be stated.

The collector receiving an application will, by himself or his deputy, make such examination as may be necessary to verify the correctness of the description given in the application, and will transmit the application to this office, together with his certificate of its correctness. The collector will at the same time state the means of access to the distillery, whether by railroad, steamboat, or canal, and with what points the distillery is connected by either of these modes of communication. If there is any person carrying on the trade of coppersmith in the immediate vicinity, the collector will state the fact; and, if not, he will state the distance to the nearest point at which the service of such artisan can be procured.

24 Every owner of a distillery will be required, at the time of making application, to deposit with the collector a sum in money or in United States bonds equal to the price named above for the size of meter required, with an addition of twenty-five per centum thereto, as a guarantee of the good faith with which the application is made, and to secure the contractor prompt payment upon the completion of the work.

Meters will be attached under the joint supervision of the manufacturer and of an officer who will be specially detailed for that purpose. The doubler and condenser will be required to be supported upon blocks of glass of not less than six inches in height, unless the vessels are of such capacity as to render it more feasible to suspend them from above. The pipe leading from the still to the doubler will be required to be fitted with a valve which will open with the pressure of the steam, so that it will close when the still is not in operation, and the discharge-pipe from the doubler will be fitted with another valve, so arranged as to open and close simultaneously with the valve upon the other pipe.

But one opening can be allowed in the doubler or into the condenser, and in every case this opening must be closed with a cover or door, which must be locked, and the lock fitted with a seal to be inserted by the collector of the district, who will retain the key. The doubler and condenser, as well as any auxiliary vessels which may be used, must be so placed as to leave sufficient room on all sides to allow an officer to pass around and inspect the sides from time to time.

The work of constructing the meters will be pushed forward as rapidly as possible, and it is believed that a sufficient number to supply all distilleries continuing in operation will be completed before the 1st day of November. In the mean time, every distiller who has made application for a meter, and who has complied with all other requirements of the statute, will be allowed to continue until such time as the government is able to furnish a meter to be attached to his distillery; but no distiller will be allowed to continue after the 15th day of May, 1867, unless he shall before that time have made application in the manner prescribed. Should any distiller continue in operation after that date, without having complied with this requirement, it will be the duty of the collector to take immediate measures for a condemnation of the distillery and the enforcement of the penalties, as provided by section 25 of the act of March 2, 1867.

As fast as the meters are successively completed the distilleries to which they are to be attached will be designated by the Commissioner, and all necessary special instructions will be given.

Distillers of apples, grapes, and peaches, exclusively, will be exempted from the requirements of this circular.

E. A. ROLLINS,
Commissioner.

O.

Letters with which the applications mentioned in findings 2 and 3 were transmitted to Mr. Tice.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, October 16, 1868.

SIR: I inclose you herewith meter applications made under the act of July 20th, 1868, by distillers, as follows:

* * * * * * *

Joseph S. Finch, of the 22nd Penn.

* * * * * * *

25 You will please furnish these distillers with meters, in accordance with their applications, as soon as practicable.

Very respectfully,

E. A. ROLLINS,
Commissioner.

ISAAC P. TICE, Esq.,
No. 314 *3d Avenue, New York City.*

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE.
Washington, March 25, 1869.

SIR: I inclose to you herewith meter applications as follows, funds to pay for the meters having been deposited:

* * * * * * *

Joseph S. Finch & Co., 22nd Penn. district.

* * * * * * *

Very respectfully,

T. HARLAND,
Deputy Commissioner.

ISAAC P. TICE, Esq.,
314 *3d Avenue, New York City.*

CONCLUSIONS OF LAW.

On the facts found by this court the claimants are not entitled to recover, and their petition must be dismissed for the reasons stated in the opinion of the court.

26 V. *Opinion of the court and dissenting opinion.*

RICHARDSON, *J.:*

The facts in this case, aside from the regulations, instructions, and circular-letters of the Commissioner of Internal Revenue relating to meters generally, are few and simple.

In the year 1868 and subsequently the claimants had two distilleries, numbered 1 and 4, in the twenty-second collection district of Pennsylvania. Upon printed blanks furnished by the Commissioner to all distillers, they made applications through the collector of the district, on the 9th and 23d of October of that year, for meters for distillery 1, and therewith made with the collector the deposit required by the regulations for the price of the same, $2,050; and on the 12th of March, 1869,

for meters for distillery No. 4, with the required deposit for the price, $2,100. These applications were duly forwarded to the Commissioner, and by him transmitted to Mr. Tice, the manufacturer. The meters thus applied for were delivered at the distilleries, those for No. 1 December 19, 1868, and those for No. 4 July 26, 1869. The certificates of deposit for said sums of money issued upon ordering the meters were sent by the collector to Mr. Tice and were received by him. The meters for distillery No. 1 were never set up, as the distillery ceased to run long before any person went there to make the attachment, and those for No. 4 were set up and attached about September 1, 1869, but never worked properly. It does not appear that the meters were tested before being shipped from the manufactory, or that any officer was detailed to supervise their attachment or to test them after attachment, or that daily reports were made by the storekeeper to the assessor setting forth the indications as shown by the meters at noon, or that meter-indications were considered by the assessor in making his monthly computation of the product of said distilleries.

The legal questions which arise relate to the duties, rights, and liabilities of the respective parties under the statutes and the regulations, circulars, and instructions of the Commissioner of Internal Revenue respecting distilleries and meters and the object and use of meters, in connection with these facts. It is necessary, therefore, to make a careful examination of those statutes and regulations.

By the act of July 20, 1868, chapter 186, (15 Stat. at Large, 125,) which was passed by Congress before the transactions set forth in the findings occurred, it was provided, among other things, in section 1, "that there shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid, a tax of 50 cents on each and every proof gallon, to be paid by the distiller, owner, or person having possession thereof before removal from distillery warehouse," and in section 2 "that proof spirits shall be held and taken to be that alcoholic liquor which contains one-half its volume of alcohol of a specific gravity of seven thousand nine hundred and thirty-nine ten thousandths (.7939) at sixty degrees Fahrenheit."

In order to primarily determine the quantity of spirits produced at any distillery liable to be taxed, the following requirements were made, some for precautionary purposes, and some for direct application:

27 By section 15 it was enacted "that every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of the distillery premises, to be used only for the storage of distilled spirits of his own manufacture, * * * and such warehouse, when approved, * * * is hereby declared to be a bonded warehouse of the United States." * * *

By section 16, "The owner, agent, or superintendent of any distillery, established as hereinbefore provided, shall erect, in a room or building to be provided and used for that purpose and for no other, * * two or more receiving-cisterns, each to be at least of sufficient capacity to hold all the spirits distilled during the day of twenty-four hours, into which shall be conveyed all the spirits produced in said distillery, * * * and on the third day after the spirits are conveyed into such cisterns, (or, on application to the assessor, at any time previous to the third day,) the same shall be drawn off into casks under the supervision of such gauger in the presence of the storekeeper, and be moved directly to the distillery warehouse."

By section 23, "All distilled spirits shall be drawn from the receiving-cisterns into casks, * * and shall thereupon be gauged, proved, and

marked by an internal-revenue gauger, * * * and shall be immediately removed into the distillery warehouse." * *

By section 19 the distiller was required, on the 1st, 11th, and 21st of each month, to render to the assistant assessor an account taken from his books, of the quantity and kind of materials used for the production of spirits each day, and the number of wine-gallons and of proof-gallons produced and placed in warehouse; and this return was to be under oath, and any false entry subjected the distiller to penalties. By section 53 the gauger was required to make a daily return to the assessor as well as collector, of all articles gauged and proved or inspected by him, and for whom, and the number and kind of stamps used by him. The storekeeper in charge of the warehouse (§21) was to record in a book a daily account of all the meal and vegetable productions or other substances brought into the distillery or on the premises, to be used for the purpose of producing spirits, and of all spirits drawn from the receiving cistern, and some other items. By the regulations he too reported all these facts from his books to the assessor monthly.

Upon the receipt of the returns from the distiller, three times a month the assistant assessor was, by the instructions, to make a personal examination of the books and premises, and of the accuracy of the entries and then transmit the returns to the assssor.

Up to this point in the proceedings, the distiller had become liable to the tax on all spirits that had been reported as gauged by the gauger, and included in his own sworn return of the quantity produced, and no more, his return being regarded as conclusive unless some error or fraud should be detected.

The next step was provided for by section 20. "On the receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him, and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained, and forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller shall
28 have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency." * * *

We omit any reference to the manner of paying the tax as not material to the issues here raised.

Thus the quantity to be taxed was primarily determined by gauging the spirits as they were transferred from the cisterns to the casks. But as the spirits might remain till the third day in the cisterns, it was possible for the distiller, by fraud, to withdraw portions therefrom before gauging, and so avoid the tax to a greater or less extent, or they might be under measured by the gauger; and the principal method relied upon to detect such fraud was by the calculations of the assessor under the twentieth section, and his comparison of the quantity accounted for by the distiller with the capacity of the distillery and the quantity of materials used.

But in the act of 1868 there was inserted, in section 2 (15 Stat., 125), a further provision, intended to afford additional protection to the government and to enable frauds to be more readily detected, as there was in the previous act of 1867, (Ch. 169, sec. 15, 14 Stat. at Large, 481.) It was in these words: "And the 'Commissioner of Internal Revenue, for the prevention and detection of frauds by distillers of spirits, is hereby

authorized to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments, meters, or other means for ascertaining the quantity, gravity, and producing capacity of any mash, malt, or beer used or to be used in the production of distilled spirits, and the strength and quantity of spirits subject to tax, as he may deem necessary * * ." And by section 3 it was enacted, "that whenever the Commissioner of Internal Revenue shall adopt and prescribe for use any meter, meters, or meter-safes, it shall be the duty of every owner, agent, or superintendent of a distillery to furnish and attach, at his own expense, such meter, meters, or meter-safes as may have been prescribed for use at his distillery, and to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment in accordance with the regulations of the Commissioner." * *

On the 16th of September, 1868, the Commissioner issued a circular, of which the parts material to the present consideration were as follows:

"Notice is hereby given that the Commissioner of Internal Revenue has adopted and prescribed for use in distilleries the spirit-meter invented by Mr. Isaac P. Tice, of New York."

* * * * * * *

"The meter adopted, being the invention of Mr. Tice, and secured to him by letters patent, can only be made by him or under his license; and in order to guard against an unreasonable price being demanded of those who are bound by law to purchase it, the prices of the several sizes, under an arrangement made between Mr. Tice and the government, have been determined by a committee consisting of * * *, all practical and skilled machinists, two of whom were designated by the government and one by Mr. Tice, and the sums hereinbefore named are the prices agreed upon by them for the meters delivered at the place of manufacture * * ."

* * * * * * *

"Under the provisions of section 3, distillers are required to procure and attach such meters, and in making their applications therefor they must state the capacity of the still in cubit feet, and its utmost possible producing capacity per minute; * * * ."

* * * * * * *

29 "This application will be made on Form 7, as heretofore prescribed, which will be furnished by the collectors of the several districts. At the time of making the application the applicant will furnish to the collector of his district a certificate of deposit in a United States depository for the amount of the price of the meter or meters, payable to the order of Mr. Tice, and the collector will certify upon such application that he has received such certificate, and forward the application to this office for transmission to Mr. Tice."

* * * * * * *

"Upon the delivery of the meter to the distiller, the collector will at once transmit the certificate of deposit to Mr. Tice, at his address, 314 Third avenue, New York City."

"Meters will be attached under the joint supervision of the manufacturer, or his agent, and of an assistant assessor, who will be specially detailed for that purpose by the assessor of the district, who will report the name of such assistant to this office."

"The expenses of transportation and attachment of the meters, and

of any changes required to be made in the distillery, are to be paid by the distiller."

"So long as meters are ready for delivery, distillers must procure and attach them. Should any distiller refuse to procure and attach a meter, it will be the duty of the collector to close the distillery, and forthwith institute the proper proceedings for its condemnation and the enforcement of the penalties as provided by law."

On the same day the Commissioner addressed a letter to Mr. Tice, notifying him of the adoption of his meter and directing him to proceed with the construction, provided he was willing to do so upon the conditions therein set forth, and among them were the following:

"First. Samples of the meters A and B, and of the single and double-counter meter, will be kept, and each set of meters will be tested and compared with the sample by an officer detailed for that purpose before being removed from the factory and again after being finally attached to the distillery; and if any meter, upon being so attached, shall prove to be defective in any respect, the defective part shall be replaced or a new meter furnished, without additional expense to the distiller."

* * * * * * *

"Fifth. You are to furnish the meters in good order and condition ready for transportation, at the prices fixed by the committee, which are as follows:

* * * * * * * "

One meter was required to be attached to the tail of the worm of the still, and in case of the manufacture of high wines, another was attached to the doubler, so as to register all the spirits which came in a manufactured state from the still; and, if correctly kept and the proper calculations made, they would give the exact quantity of spirit which passed into the cistern. The storekeeper, a different officer from the gauger, who, as we have seen, measured the spirit as it passed from the cistern into the casks, was required by the regulations to make a daily report to the assessor of the indication of the meter at 12 o'clock meridian, and the assistant assessor was required to render a like report whenever he visited the distillery. And the instructions were that the assessors "in making their monthly computation [under section 20, above cited] will use the information thus given, in determining the production;" that is, in determining whether or not the distiller had accounted in his returns for all the spirits produced.

Notwithstanding the requirements of the Commissioner, the
30 meters generally did not prove a complete success, either because of the trouble and expense they caused to the distillers, the additional trouble to the storekeeper, assessor, and other officers, the reduction of the tax on spirits from $2 to 50 cents a gallon, thereby lessening the object, and the attempts to commit fraud, or for other causes, and on the 8th of June, 1871, the then Commissioner issued a circular in these terms: "It having been ascertained by experience that these meters, as a class, do not fully answer the purpose for which they were intended, their use is hereby discontinued, and all existing orders, prescribing the same, are revoked. All meters attached to distilleries may be detached. The meters being the property of distillers, they will be permitted to dispose of them as they desire." And in June, 1872, so much of sections 2 and 3 of the act of 1868 as related to meters was repealed, and the further use of meters was finally abandoned by law. (17 Stat. at Large, 239.)

There were circulars and instructions from the Commissioner of In-

ternal Revenue of different dates, which we shall have occasion to refer to hereafter, but we have cited enough from the statutes and regulations to show distinctly the object of introducing the meter, for whose benefit it was to be used, and the respective duties of the distillers and the officers of the United States in relation thereto. They may be thus recapitulated:

1. The meter was for the use and benefit of the defendants, to enable them to prevent and detect frauds by distillers, and for no other purpose, and its method of use was an additional means afforded the assessor of determining with more or less accuracy whether the distiller had accounted in his returns for all the spirits produced by him, or whether some had not been abstracted from the cistern before being gauged, or the gauger had fraudulently under-measured and under-registered the quantity. If not used by the officers, the defendants lost the benefit of one check upon the distillers, and that was all.

2. It was the duty and the obligation of the distiller to furnish and attach, at his own expense, the meter prescribed, and to furnish all the pipes, materials, and labor necessary to complete the attachment. To him it was an expense and a tax imposed by statute as a condition to his right to continue his business, and if he omitted to comply with the terms of the law a penalty might have been exacted of him under section 96, or the officers would close the distillery.

3. The duties of the public officers were:

First, those for the benefit of the defendants: An officer was to be detailed to test the meters before removal from the manufactory, and again after being finally attached, and some officer was to supervise the attachment. The storekeeper was to register the indications of the meter daily and report to the assessor; the assistant assessor was also frequently to examine and report the indications of the meter, and the assessor was to use those reports, in his computations, to detect frauds.

Second, those for the benefit of the distillers: The collector was to receive applications for meters, to take a certificate of deposit in the name of Mr. Tice for the price at which the manufacturer had agreed to furnish them, to forward the applications to the Commissioner, by whom they were to be transmitted to Mr. Tice, and, upon the delivery of the meters to the distiller, the collector was required to "at once transmit the certificate of deposit to Mr Tice to his address in New York." That was all the Commissioner undertook to do for the distiller, and was the only contract, express or implied, that was made with him by the defendants. And this was wholly gratuitous on the part of the Commissioner, and for the sole benefit of the dis-
31 tillers, to protect them from extortion by the manufacturer, who had a patent on his meter, and but for the precaution of the Commissioner in making an arrangement as to price, might have compelled distillers to submit to unreasonable prices or great extortion. But this did not preclude distillers from purchasing from the manufacturer directly, at any price, or from purchasing of other parties at second hand. Distillers were by law to furnish the meters, and the law would have been complied with, however they obtained them. The distillers did, however, incidentally gain another andvantage by applying for meters through the collectors. When they made application to the collector, and made a deposit of the price, they complied with the regulations, and would not be proceeded against for not having otherwise furnished and attached the meters required by law. Until the meters arrived they would have all the benefits which would accrue to

them from the instruments themselves without the expense of attaching them, and, so far as they were concerned, it would be to that extent more profitable that no meter should be delivered.

Upon these provisions of the statutes and regulations principally the claimants' case must stand or fall.

The action is founded on contract and the breaches set forth in the petition are of two classes—

1. That no assistant assessor was ever officially detailed to supervise the attachment of meters at their distilleries; that no notification of any such appointment or detail ever reached them; that no assistant assessor ever did superintend the attachment of said meters or the adjustment thereof; that no complete attachment or perfect adjustment of said meters was ever made, and, furthermore, that said meters were never used at their distilleries "for the prevention of frauds" or ascertaining the quantity of spirits subject to tax.

And the facts found substantially support these allegations. But every one of these acts, which were omitted or neglected by the defendants' officers, were to be done for the benefit of the defendant, and not for the claimants. The requirements of the regulations that the meters should be tested, their attachment and adjustment supervised, and the meters used for the prevention and detection of fraud by the distillers were not contracts with the claimants, but were directions to the defendants' officers, the neglect of which might work all the harm and loss to the government which the statute authorizing the adoption of meters was intended to prevent, and could not injure the claimants. It was of no object to the claimants to have these things done. If the defendants' officers had insisted upon the attachment of the meters, and supervised the same, the claimants would have been subjected to so much additional cost. The regulations specify that "the expenses and transportation and attachment of the meters, and of any changes required to be made in the distillery, are to be paid by the distiller," and "distillers must furnish all lumber and other materials necessary for the attachment of the meter, and such workmen and assistants as may be required." To that extent, then, the claimants were benefited by the acts complained of.

This court, as well as the supreme court, has repeatedly held that the United States was not liable for the wrongful acts of their officers, which are not breaches of contracts, even when those acts cause loss and damage to other parties; and it is a novel proposition to claim that the government is liable for the neglect of duties by public officers when such neglect works, as in this case, not only no injury to the claimants, but in fact a pecuniary gain to them, while it may have subjected the defendants to great loss. The proposition really is, that the de-
32 fendants shall be held liable to others for injuries and losses inflicted on themselves by their own officers. And still more novel is the claim that the defendants are liable to a distiller because their officers did not use the meters to prevent and detect his frauds. If he were not committing frauds, their use would be of no importance, and, if he were committing frauds, their detection would be the last thing he would desire. The claimants did not pay the money, now sought to be recovered, in consideration that the public officers would do their duty to the defendants in the particulars named, and the defendants never contracted with them that those officers should perform their duty, and so the failure to do the acts complained of does not constitute a failure of consideration entitling the claimants to recover back the money paid.

2. The petition also sets forth allegations that the money for the meters was paid to the collector upon the implied contract that the United States would supply, through said collector, merchantable and perfect meters for use in and about the distillery premises, for the purposes set forth in the laws and regulations and of value equal to the amount deposited; and they declare that the meters received by them were valueless and useless.

We find no such contract. The money was paid that the manufacturer should furnish the meters required for the claimants' distilleries by the laws and regulations, in order that they might be permitted to carry on their business; for without them their distilleries might be closed and they subjected to penalties. The statute required distillers to furnish meters not for their own use, but for the use of the defendants. The defendants undertook no more than to have their officers receive the application for the meters, with a certificate of deposit in the name of Mr. Tice, the manufacturer, for the price, to transmit the application at once to the manufacturer, and to forward to him the certificate of deposit as soon as the meters were delivered at the distillery. As soon as the deposit was made, the distillers were considered as having complied with the statute, and if they were not complained of or disturbed, it was immaterial whether the meters ever arrived or not, and if they arrived, it was equally immaterial to them whether or not they were perfect for the purpose intended—the prevention and detection of frauds by themselves. And it does not appear that the meters in this case were unmerchantable, valueless, or useless. They were never used, because the defendants' officers neglected the duties they owed to the government, and in 1871 all meters were abandoned by the Commissioner, because it had been ascertained by experience that they, as a class, did not fully answer the purpose for which they were intended, but this does not establish the fact that the meters delivered to the claimants were either unmerchantable, valueless, or useless, and we have no other facts on that subject.

The counsel for claimants in their brief maintain that the deposits made with the collector were unwarrantably forwarded to Mr. Tice, the manufacturer, too soon, and that the collector was bound to retain them until the meters were attached to the distilleries and tested, and that the defendants, through their officers, have had the claimants' money and have misapplied it.

In our opinion, these propositions are not supported by the facts.

The regulation of September 16, 1868, provided that "at the time of making the application [for meters] the applicant will furnish to the collector of his district a certificate of deposit in a United States depositary, for the amount of the price of the meter, payable to the order of Mr. Tice," * * "upon the delivery of the meter to the distiller, the collector will at once transmit the certificate of deposit to Mr. Tice, at his address, 314 Third avenue, New York City."

33

In the regulation of March 30, 1869, these provisions were again promulgated in exactly the same language as before, except that the certificate of deposit was required to be forwarded to Mr. Tice "upon the receipt of the bill of lading." Among the regulations of that date are the following instructions:

"Under the provisions of the law the distiller is required to furnish and attach meters at his own expense, and also to furnish all pipes, materials, labor, and facilities necessary to complete such attachment. The first duty of a distiller is, of course, to procure a meter. The manufacturer is not required to furnish the meters on credit and ought not

to be expected to do so. When he ships a meter to a distiller, in accordance with the application, the manufacturer is entitled to the pay for it. The law does not require the manufacturer to attach it, but on the contrary requires the distiller to attach at his own expense."

If, then, the regulations and instructions were obeyed, the defendants' officers had no money of the claimants, but they held certificates of deposits payable to Mr. Tice, and these they were required to forward to Mr. Tice as soon as the meters or the bills of lading were delivered.

Under the former law and regulations of 1867 distillers were required to deposit with the collector money or bonds as a guarantee of good faith and to secure the contractor prompt payment upon completion of the work. This plan was abandoned under the law of 1868, and the system adopted which we have pointed out.

The claimants admit in their petition that the meters for the payment of which their deposit was made arrived for their respective distilleries, in December, 1868, and July, 1869, and the facts found show that those for distillery No. 1 were delivered December 19, 1868, and those for No. 4, July 26, 1869. That being the case, it was the duty of the collector at once to transmit the certificates of deposit to Mr. Tice, without waiting to have the meters attached and tested, and this he did.

Our attention has been drawn to the circular-letter of January 8, 1869, from the Commissioner to the collectors, as follows:

"SIR: You will forward no certificates of deposit in payment for meters delivered until the meters are attached to the distilleries, and in future you will take the certificate of deposit in your own name, changing those which have been already taken, if you can do so."

This letter has no material application to the claimants' case. Before it was issued the meters for distillery No. 1 had been delivered, and Mr. Tice had received or had become entitled to the certificate of deposit therefor. A month later, February 5, 1869, the Commissioner, in a circular of that date, revoked that direction to collectors, as to meters previously delivered, in these words: "Where meters had been delivered prior to the receipt of the instructions of January 8, collectors will promptly forward to Mr. Tice the certificates of deposit therefor, and measures will be taken to have them attached." And by the regulations of March 30, 1869, the whole letter was superseded and the former rules re established with more stringent directions, as we have quoted them. So, in July, 1869, when the meters for distillery No. 4 were delivered, the instruction of January 8, 1869, not being in force, the collector was right in transmitting the deposit-certificate to Mr. Tice, according to the regulations then in force. The only application which the letter of January 8 could have to the claimants' deposits was that it required the certificate for the price of meters for distillery No. 4, applied for March 12, 1869, to be taken in the name of the collector, but that is not
34 material, since the collector transmitted the certificate as required by regulations and instructions to Mr. Tice.

In the case of Sausser vs. The United States, (9 C. C. R., 338,) the claimants' assignor, one McGehan, in making application for a meter for his distillery, deposited with the collector money as security for payment thereof, as he was required to do under the statutes and regulations of 1867, then in force, and took a receipt therefor. This receipt passed to his vendee and successor in the distillery. The collector misappropriated and did not account for the money, and went out of office. Subsequently, when the meter arrived, the then collector demanded payment, and refused to recognize the receipt given by his predecessor, and the claimant was compelled to pay for the meter again or have his

distillery closed. The court held that the United States was liable to refund the money thus misappropriated by the first collector. But that is not this case. Here there has been no misappropriation, the claimants have received the meters applied for, they have not been compelled to procure other meters in order to carry on their business of distillers, and their distilleries have not been interfered with.

There is another fatal defect in the claimants' case. They received the meters in 1868 and 1869, and have never returned them or offered to return them, and have them now, unless they have sold them, as they might have done at any time after delivery. We cannot presume that these meters were of no merchantable value if they were perfect, and if not perfect the purchasers should have returned them to the manufacturer, or notified him to remedy any defects. For two years or thereabout, after their delivery, such meters were required at all the distilleries in the United States, and therefore may have had a commercial value. And whether they were of any value to the claimants or not they chose to keep them and not to return them to the manufacturer.

It is one of the most familiar elementary principle of law that the puchaser of personal chattels who undertakes to rescind the purchase altogether, and seeks to recover back the whole consideration paid, as in this case, must return, or offer to return the articles received by him. He cannot both keep the chattels and have his money refunded.

In the case of Sausser vs. The United States, (11 C. C. R., 538,) we considered some of the questions which arise in this case, and now, after a full and careful reconsideration of the whole subject, we adhere to the views expressed in the opinion therein; and in this case, as we held in that, we hold that the claimants have no cause of action and that their petition must be dismissed.

PECK, Judge, dissenting:

In this case, I think, the rules and regulations established by the appropriate department in relation to distillers and the Tice meter were purposely so expressed as to lead the distillers to suppose that they were to be, and should be, protected by the United States in the expenditure of their money for the meters, against all defects in the meters, and against any imposition of the constructor, or of the officers acting for the United States. The business of distilling was prohibited, the capital employed in that business was lost and useless to the owner unless he should first purchase a Tice meter. He was in fact under "duress" of the strongest character which did not extend to life or limb, to deposit his money for the payment of the meter, and the government promised that if he would do so they would undertake to protect him, and take care that the instrument which it—not he—demanded, should be of benefit and useful to both, and until such instrument, to be previously examined and inspected by the defendants, was furnished and tested, they agreed to keep his money for him, or, in other words, not to pay it over. The meter could not be attached to the distillery except through or by the agents of the United States. The claimant could not help or protect himself in the least. He was not permitted to participate in any way in the purchase of the meter, or to judge of its quality, or fitness, or adaptation to the use for which it was designed; in plain language it was a command to him which he was powerless to resist. It was a modified change from the language of the highwayman, "Your money or your life;" in this case, it was your money for the meter, or a waste of your capital and an abandonment of your business and its pursuits. If the business was against

public policy or good morals it should have been forbidden, but not tolerated or perhaps encouraged, provided it should be prosecuted under the forms of law and the protection and shield of a Tice meter.

It is plain that the meters were useless as detectors of fraud, and for this reason they were everywhere abandoned and condemned. In this particular case only one of the meters, which proved to be defective, was ever applied to the distilleries of the claimants. The other meter was never even delivered in the manner required by or within the direction and meaning of the rules and regulations of the department.

The defendants undertook and promised that they would, through the instrumentality of their officers, hold the money of the claimants for their security and benefit until certain obligations which the defendants assumed and declared were for their benefit, as well as for the benefit of the claimants, should be complied with by a third party; and without this, that the money of the claimants should be kept for them. If this was not to be so, what other meaning can be connected with the transaction? If the interests of the government were not such as to warrant the employment of its officers in the character of stakeholders, why did it interfere with the business of a citizen and not permit him to bargain for himself, at the peril of having his business stopped, compelling him to pay his money without choice or discretion of his own? Why not compel him to purchase all his machinery and material for carrying on his distillery of some particular individual? This would have been another way of discovering frauds, quite as effectual at least as a Tice meter.

To say that the condemned meters were left at the disposal of the claimants, who might sell them and so get an equivalent for their money, is to feed them with stones instead of bread, is to offer them a taunt rather than a reason, tendering a sarcasm in lieu of dollars, compelling them to take as a compensation for the protection offered them useless and condemned instruments which are without value save what they may bring as wasted and useless material.

All the transactions between the government and its citizens should have not only the appearance of fairness, but should be marked by the reality of it; all semblance of speculation or cunning should be avoided and condemned. An attempt to shirk responsibility, if it fairly attaches to the government, is not to be commended; honesty, as a policy merely, is more important in the conduct of public than of private affairs, and should always be regarded, and is best enforced by the example of shining marks. The citizens should not be taught by the highest power in the land, when he deals with it, that he is to encounter artifice and deception, and is to overcome these, if at all, by a resort to the same degrading expedients. An unfair government begets
36 unfairness in the citizen, an immoral contagion is spread, until both, suffering from the taint, travel on the downward road, forgetting that "corruption wins not more than honesty," but ruins all. Dollars, when placed in the scale against integrity and fair dealing, are certain to weaken the confidence of the people in the good faith of their government, and they will be willing to see it destroyed. An offense against good morals can never be outweighed by pecuniary gains.

I say, without feeling any compunction for the utterance, that I do not discover in this matter between the claimants and defendants anything in the likeness of paternal or benevolent or even just treatment of the citizen by the government, since it refuses to return the money of these claimants which they were compelled to trust to its keeping, which it has misappropriated, and which is now lost to them.

37 IV. *Final judgment.*

At a court of claims held at the Capitol in the city of Washington, the 28th day of May, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants and order, adjudge, and decree that the said petition of Joseph S. Finch and John W. Painter, partners under the firm of Joseph S. Finch and Company, claimants, be dismissed.

By the court.

38 VII. *Application for an appeal and order allowing same.*

And now come the claimants aforesaid by their counsel and move the court for leave to appeal the above named cause to the Supreme Court of the United States.

O. S. LOVELL,
Att'y for Claimants.

Filed June 4, 1877.

Ordered that the appeal be allowed as prayed for.
By the court.
June 4, 1877.

39 In the Court of Claims.

JOSEPH S. FINCH AND JOHN W. PAINTER, partners under the firm of Joseph S. Finch and Company, } No. 10265.
vs.
THE UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the findings of fact by the court, and the conclusions of law thereon, of the opinion of the court, of the final judgment by the court, of the application for the allowance of an appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this second day of November, 1877.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 342. Joseph S. Finch and John W. Painter, partners under the firm of Joseph S. Finch & Company, appellants, vs. The United States. Court of Claims. Filed 2d November, 1877.

OFFICE SUPREME COURT U.S.
FILED
NOV 9 1880
JAMES H. McKENNEY, Clerk

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, A. D. 1880.

JOSEPH S. FINCH AND JOHN W. PAINTER, Partners under the Firm Name of JOSEPH S. FINCH & Co., Appellants,
vs.
THE UNITED STATES.
No. 83.

BRIEF AND ARGUMENT FOR APPELLANTS

—BY—

LEWIS ABRAHAM.

WASHINGTON, D. C.:
MAX COHEN, PRINTER, 613 7th St.
1880.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1880.

JOSEPH S. FINCH AND JOHN W. PAINTER, Partners under the Firm Name of JOSEPH S. FINCH & Co., Appellants,
vs.
THE UNITED STATES.
No. 83.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF AND ARGUMENT FOR APPELLANTS.

I.

STATEMENT OF APPELLANTS' CASE.

The appellants instituted their suit in the Court of Claims, on the 27th day of January, 1875, to recover from the United States the sum of FOUR THOUSAND ONE HUNDRED AND FIFTY DOLLARS. That sum being the amount paid by the appellants, to the United States, for two mechanical devices, which were known and described as "TICE'S METERS," and which were to be attached to and placed in the distilleries owned and operated by the appellants in the 22nd Internal Revenue Collection District, in the State of Pennsylvania.

The petition of the appellants, after averring the application by them for said meters, the payment to the Collector of In-

ternal Revenue of *the price fixed by the United States therefor*, makes the following averments:

1st. That the said meters arrived at the respective distilleries for which they were ordered, but that they remained uncared for and uninspected by any officer of the Government.

2nd. That they were never properly attached to their distilleries, or to the apparatus thereof, as contemplated by law.

3d. That the Commissioner of Internal Revenue, in a public notice issued by him, as Circular No. 69, directed the form of application required to be used, in order to obtain said meters, and also in said Circular declared "*that meters will be attached under the joint supervision of the manufacturer or his agent*, AND OF AN ASSISTANT ASSESSOR, WHO SHALL BE SPECIALLY DETAILED FOR THAT PURPOSE BY THE ASSESSOR OF THE DISTRICT, and the name of such assistant assessor, detailed for that purpose, was to be reported to the Commissioner of Internal Revenue.

4th. That no assistant assessor was ever officially detailed to supervise the attachment of the said meters to the said distilleries, or either of them; that no assistant assessor ever did superintend the attachment of said meters, or to the adjustment thereof; that no complete attachment or perfect adjustment of said meters was ever made; that said meters were never used at either of their distilleries "for the prevention of fraud," or "for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used or to be used in the production of spirits subject to tax," or have ever been used for that or any other purpose; *and that they now are and always were valueless and useless.*

5th. That the Commissioner of Internal Revenue issued and published regulations known as Series 5, No. 5, dated June 7, 1870, acknowledging that the meters prescribed were unnecessarily expensive, and did not answer the purpose for which they were prescribed as well as the cheaper or sample meters; and

afterwards issued and published his Circular No. 96, dated June 8, 1871, and therein officially announced that the meters prescribed were imperfect and ineffectual for the purposes for which they were adopted.

6th. That, when the money hereinbefore set forth, was by them paid to the Collector of Internal Revenue for the twenty-second district of Pennsylvania, it was under the implied contract that the United States would supply, through said collector, merchantable and perfect meters for use in and about the appellants' distillery, for the purposes set forth in the laws and regulations hereinbefore recited, and of value equal to the amount deposited by them with said collector; and, furthermore, would detail an assistant assessor to superintend the attachment thereof; but herein defendants entirely failed to do and perform their part of said implied contract, whereby they became liable to the claimant in the sum deposited with the said defendant's agent, to wit, four thousand one hundred and fifty dollars.

Record pp. 2, 3.

II.

Findings of Fact.

The Court of Claims has furnished in its special verdict, upon which this cause is to be determined here, a complete record of the action of the Treasury Department in regard to the adoption, use, condemnation, and abandonment as worthless of the "Tice Meter." It is neither useful or important to invite the attention of the Court to any of these findings, except such as may be necessarily involved in the determination of the appellants' appeal; and to these, the attention of the Court is specially directed as follows:

I. That on the 16th day of September, 1868, the Commissioner of Internal Revenue issued to the owners of distilleries a "*Notice of adoption of meter and regulations for supplying distilleries with the same, and securing their proper attachment,*"

being Circular No. 69, which provided amongst other things as follows:

A. "Notice is hereby given that the Commissioner of Internal Revenue, has adopted and prescribed for use in distilleries the spirit meter, invented by Mr. Isaac P. Tice, of New York, being the same that was adopted and prescribed by the Honorable Secretary of the Treasury, on the 19th of April, 1867, under Section 15, of the act of March 2, 1867, and subsequently recommended for use by the Commission appointed by the joint resolution of Congress, approved February 3, 1868."

Record p. 5.

B. "The meter adopted, being the invention of Mr. Tice, and secured to him by letters patent, can only be made by him or under his license; and in order to guard against an unreasonable price being demanded of those who are bound by law to purchase it, the prices of the several sizes, under an arrangement made between Mr. Tice and the Government, have been determined by a committee, consisting of William T. Duvall, of Georgetown, D. C.; William P. Trowbridge, of New York; and S. J. Knowles, of Massachusetts, all practical and skillful machinists, two of whom were designated by the Government, and one by Mr. Tice, and the sums hereinbefore named are the prices agreed upon by them for the meters delivered at the place of manufacture, as stated in the report of that committee."

Record p. 6.

C. "The distillers must make application for said meters on Form 7, and at the time of making the application the applicant will furnish to the collector of his district a certificate of deposit in a United States depository for the amount of the price of the meter or meters, payable to the order of Mr. Tice, and the collector will certify upon such application that he has received such certificate, and forward the application to this Office for transmission to Mr. Tice. And the applicant should also state the means of access to the distillery, whether by railroad, steamboat, or canal, and with what points the distillery

is connected by either of these modes of communication. If there is any person carrying on the trade of coppersmith in the immediate vicinity, the collector will state the fact; and if not, he will state the distance to the nearest point at which the services of such artisan can be procured. Upon the delivery of the meter to the distiller, the collector will at once transmit the certificate of deposit to Mr. Tice, at his address, 314 Third avenue, New York city."

Record pp. 6, 7.

D. "Meters will be attached under the joint supervision of the manufacturer, or his agent, and of an assistant assessor, who will be specially detailed for that purpose by the assessor of the district, who will report the name of such assistant to this Office"

"So long as meters are ready for delivery, distillers must procure and attach them. Should any distiller refuse to procure and attach a meter, it will be the duty of the collector to close the distillery, and forthwith institute the proper proceedings for its condemnation and the enforcement of the penalties as provided by law."

Record p. 7.

II. On the day on which the said meter was adopted, as above stated, the Commissioner of Internal Revenue, addressed Mr. Tice, as follows:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, September 16, 1868.

SIR: Having decided to adopt and prescribe the meter invented by you for use in distilleries, you are hereby directed to proceed with their construction, *provided you are willing to do so upon the following conditions:*

First. Samples of the meters A and B, and of the single and double counter meter, will be kept, and *each set of meters will be tested and compared with the sample, by an officer detailed for*

that purpose, before being removed from the factory, and again after being finally attached to the distillery; and if any meter, upon being so attached, shall prove to be defective in any respect, the defective part shall be replaced or a new meter furnished, without additional expense to the distiller.

* * * * * * *

Third. The one hundred and seventeen (117) meters now finished will be immediately made ready for delivery, and the thirty-six (36) now in process of manufacture will be completed as soon as possible. The manufacture of others, to the number of five hundred (500) in all, is to be proceeded with as rapidly as possible, and thereafter not more than twenty sets are to be in process of construction at one time, unless a greater number is directed by the Commissioner of Internal Revenue.

Fourth. The Commissioner reserves to himself or his successor in office the right at any time to adopt any improvement of the meter or system, *or to revoke the order adopting the meter, and to direct on the part of the Government a discontinuance of its manufacture.*

Fifth. *You are to furnish the meters in good order and condition ready for transportation,* at the prices fixed by the committee, which are as follows:

Sample-meter A	$200
Sample-meter B	$250
Meter No. 1, single counter	$450
double counter	$500
Meter No. 2, single counter	$600
double counter	$650
Meter No. 3, single counter	$800
double counter	$850
Meter No. 4, single counter	$1,000
double counter	$1,050

The cost of transportation, and expense of attaching the same, to be paid by the distiller.

Sixth. *The attachment of the meters is to be made under your*

direction, and also under the supervision of the officer to be detailed under the regulations, and after the final attachment and closing of the meter the working of the overflow-valve is to be tested by flooding the meter.

Seventh. You are to report to this Office at the end of each week the number of meters that have been delivered, and to whom the same were shipped, and the number on hand ready for delivery.

Very respectfully,

E. A. ROLLINS,
Commissioner.

ISAAC P. TICE, Esq.

Record pp. 7, 8.

III. That the appellants, in the years 1868, 1869, were lawful distillers in the city of Pittsburgh, Pennsylvania, having two distilleries designated as Nos. 1 and 4, situated in the then twenty-second collection district in said State.

Record p. 4.

IV. That at different times, viz: October 9 and 23, 1868, and March 12, 1869, the appellants, in compliance with the regulations of the Commissioner of Internal Revenue, and upon the forms prescribed for that purpose, made application to the Collector of Internal Revenue, of said District, for meters for each of said distilleries, which applications were forwarded by the said collector to the Commissioner of Internal Revenue, who transmitted them to the said Isaac P. Tice

Record p. 4.

V. The meters applied for by the appellants in October, 1868, arrived at the distillery, on the 19th day of December, 1868, but they were never set up, and the distillery ceased to run *long before any* one went there to make the attachment.

Record p. 4.

VI. The meters applied for by the appellants, on the 12th

day of March, 1869, arrived on the 26th of July, 1869, and were set up and attached to distillery No. 4, about September 1, 1869, *but never did work properly.*

Record p. 4.

VII. The sum of four thousand one hundred and fifty dollars, paid by the appellants for the said meters, to the collector of the said district, was by the said collector forwarded to Isaac P. Tice, by whom it was received. The sum of $2,050, being transmitted on the 19th day of December, 1868; and the sum of $2,100 on the 31st day of July, 1869.

Record p. 4.

VIII. On the 8th day of January, 1869, the Commissioner of Internal Revenue addressed to *all* Collectors of Internal Revenue the following circular letter, viz:

"OFFICE OF INTERNAL REVENUE,
WASHINGTON, *January* 8, 1869.

SIR: You will forward no certificates of deposit in payment for meters delivered, until the meters are attached to the distilleries. * * * * * * *

E. A. ROLLINS,
Commissioner."

Record p. 8.

IX. That no official report of the testing of said meters before shipment from the manufactory is of record.

That no officer of the Internal Revenue was ever detailed to supervise the attachment of any meters to appellants' distilleries.

That no officer of the Internal Revenue was ever detailed to test said meters after attachment.

That there was no daily reports ever made concerning the meter indications for any ten consecutive (distillery) days.

That the meter indications were not considered by the assessor in making his monthly computations of products of distillery.

Record p. 4.

X. On the 7th day of June, 1870, the Commissioner of Internal Revenue issued a circular entitled Series 5, No. 5, entitled: "*Rules, regulations and orders relating to spirit meters,*" from which the following extracts are made:

"Experience having shown that the automatic meters herefore in use at distilleries are unnecessarily expensive, and do not so well answer the purpose for which they were designed as the cheaper and better sample-meters, or automatic meters adapted for use as sample-meters, and that the use of the second or "credit" meter may be beneficially dispensed with, it is hereby ordered that hereafter the use of all meters except said sample-meters, or automatic meters adapted for use as sample-meters, be, and is, discontinued; and that hereafter one meter only shall be required for each distillery, which shall be attached in such way as that all the spirits produced at such distillery, after the manufacture thereof is complete, shall pass through such meter; and every owner, agent, or superintendent of a distillery is hereby required, within ninety days, to remove from his distillery the meters, the use of which is hereby discontinued.

"The meters known as sample-meters, and the automatic meters adapted for use as sample-meters, invented by Isaac P. Tice, are hereby adopted and prescribed for use at distilleries; and every owner, agent, or superintendent of a distillery is required, within ninety days, to furnish and attach, at his own expense, such meters, of proper size, construction, and capacity for use at his distillery, and to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment in accordance with these regulations."

* * * * * * *

"Any meter hereafter adopted and prescribed by the Com-

missioner of Internal Revenue for attachment and use in distilleries, as well as the sample-meters and automatic meters adapted for use as sample-meters hereby prescribed, *must be attached and adjusted* under the supervision of officers detailed by the Commissioner; the understanding being that neither the Government of the United States, nor any Department or officer thereof, incurs any liability for or on account of said meters, or the attachment, adjustment, or repair thereof."

Record pp. 13, 14.

XI. On the 8th day of June, 1871, the Commissioner of Internal Revenue, issued upon this subject, the following circular No. 96:

Discontinuing the use of the Tice Spirit-meter.

"TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
WASHINGTON, *June* 8, 1871.

Under authority conferred by sections 2 and 3 of the act of July 20, 1868, the Commissioner of Internal Revenue, in Circular No. 69, dated September 16, 1868, and, again, in regulations, "Series 5, No. 5," dated June 7, 1870, adopted and prescribed for use in distilleries spirit-meters invented by Mr. Isaac P. Tice, the same having been adopted and prescribed by the Hon. Secretary of the Treasury on the 19th day of April, 1867, and subsequently recommended for use by the commission appointed under the joint resolution of Congress, approved February 3, 1868.

It having been ascertained by experience that these meters, as a class, do not fully answer the purpose for which they were intended, their use is hereby discontinued, and all existing orders prescribing the same are hereby revoked. All meters attached to distilleries may be detached.

The meters being the property of distillers, they will be permitted to dispose of them as they may desire.

A. PLEASONTON.
Commissioner."

Record pp. 15, 16.

III.

THE JUDGMENT AND APPEAL THEREFROM.

Upon the facts found, the Court of Claims, on the 28th day of May, 1877, rendered a judgment in favor of the defendant (the appellee,) and directed the petition of the claimants (the appellants) to be dismissed, from which judgment the appellants, on the 4th day of June, 1877, prayed an appeal to this Court, which was allowed.

Record p. 32.

IV.

ASSIGNMENT OF ERRORS.

The Court of Claims erred in rendering judgment for the defendant, and in dismissing the claimant's petition.

V.

ARGUMENT.

A. The Commissioner of Internal Revenue was authorized to make the contract with Tice for the manufacture of the meters, which the appellants purchased and paid for.

This proposition is settled by the decision of this Court, in the case of TICE vs. UNITED STATES 99, U. S. S. C R., (9 Otto,) p. 286, where the validity of this contract, for the manufacture of the meters furnished to the appellants was drawn in question—

We shall better appreciate the significance and force of this decision, if we bring to the attention of the Court the several

statutes authorizing the adoption of these meters, and the contracts for their construction made in pursuance of those statutes.

By Section 15 of an act of Congress, approved March 2, 1867, (14 Stats. at Law, 481,) "the Secretary of the Treasury is authorized to adopt, procure, and prescribe for use, such meters or other means for ascertaining the strength and quantity of spirits subject to tax, or for the prevention or detection of frauds by distillers of spirits, as he may deem necessary."

On the 18th day of April, 1867, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, adopted the "Tice Meter," and entered into a contract with Tice for their manufacture, upon the terms stated in the agreement, appearing in the Record pp. 16 and 17. The material parts of which are as follows:

First. "Each set of meters will be tested by an officer detailed for that purpose, before being removed from the factory, and again, after being finally connected with the distillery, *and no meter will be accepted which is not found to work satisfactorily, when subjected to these tests.*

* * * * * * *

Third. You will proceed immediately with the construction of the first set of meters, which shall be of such dimensions as to be suitable for use in a distillery of the medium capacity, for which it is intended to provide, and as soon as the same shall be completed and inspected, which shall be attached to a distillery to be designated by this Office, and which shall be as near the place of manufacture as can be conveniently selected, *and if at the end of one month, from the time it is attached to the distillery, there shall not have appeared sufficient reason for the Government to decline the further use of the meter or system, the meter will be accepted*, and the distiller will be required to pay for the same. Pending this trial, you will be at liberty to proceed with the construction of other meters, *provided it is clearly understood, that in the event* OF THE FAILURE

OF THE EXPERIMENT *above required with the first meter, you shall not be entitled to any pay, nor to any claim upon the Government for any expenses which you may have incurred.*

Fourth. The Secretary of the Treasury holds himself at liberty at any time to adopt any improvement or modification of the meter system, or at any time to revoke the order adopting the meter, *and to discontinue their manufacture on behalf of the Government.*

"If the first meter shall prove successful, when subjected to the tests above set forth, and the Government shall subsequently revoke the adoption of the meter, and order a discontinuance of proceedings, you will be paid such sum as may be determined upon in the manner hereinafter stated for all instruments which you may have completed or have in process of completion at the time of such revocation, provided that at no time shall you have more than twenty sets in process of manufacture at any one time, unless direction shall be given hereafter for the manufacture of a larger number."

Fifth. "Three competent persons shall be selected, one by the Secretary of the Treasury, one by the Commissioner of Internal Revenue, and one by yourself, who shall together examine into the actual cost of the construction of the meter, including interest on necessary outlay, and the cost of attaching the same to a distillery, and who shall also determine what amount shall be added to such cost, in order to furnish a proper remuneration for the invention and manufacture of the meter. When the price of the first meter is thus determined, it shall form the basis for a price of other meters of similar capacity until such time as a re-examination shall be made, which may be done at any time at the instance either of the Government or of yourself. It is understood that in every case the expense of transportation and of attaching and superintending the attachment of the meter will be added to the price fixed upon, at the place of manufacture."

Sixth. "If any distiller who has made application for a me-

ter shall fail to put his distillery in operation immediately after the meter is attached, so that it will be impossible to test the meter in actual operation, or shall decline to have it affixed upon completion, he will be required to pay for the meter precisely as if it had been tested and found to work successfully. The meter will then be tested whenever the distillery commences operations, and if not found to work satisfactorily, the distiller will be compelled to suspend operations until the defect is cured, at his expense."

By the joint resolution, approved February 3, 1868, (15 Stats. at Large, 246,) Congress directed the appointment by the Secretary of the Treasury of a commission, which in connection with the then existing Commission of the Academy of Science, should examine all meters and mechanical contrivances or inventions presented to them, which were intended to measure test, and ascertain the productiveness of grain or other articles prepared for distillation, or the actual quantity and strength of distilled spirits subject to tax, produced therefrom, the result of such examination to be communicated to Congress. And the act further declared, "that pending the action of said commission, and until their report be made, and a meter shall be by law adopted, all work on the construction of meters *under the direction of the Treasury Department* be, and is hereby, suspended. "And in the meantime no further *contract* shall be made by the Secretary of the Treasury," under the act of March 2, 1867.

The act of July 20, 1868, (15 Stats. at Large, 125,) upon this subject was as follows:

SECT. 2. That proof spirit shall be held and taken to be that alcoholic liquor, which contains one-half its volume of alcohol of a specific gravity of seven thousand nine hundred and thirty-nine ten-thousandths (.7939) at sixty degrees Fahrenheit; and the Commissioner of Internal Revenue, for the prevention and detection of frauds by distillers of spirits, is hereby authorize to adopt and prescribe for use such hydrometers,

saccharometers, weighing and gauging instruments, *meters*, or other means for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used or to be used in the production of distilled spirits, and the strength and quantity of spirits subject to tax, as he may deem necessary; and he may prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking, and ganging of spirits.

SECT. 3. That whenever the Commissioner of Internal Revenue shall adopt and prescribe for use any meter, meters, or meter safes, it shall be the duty of every owner, agent, or superintendent of a distillery to furnish and attach at his own expense such meter, meters, or meter safes as may have been prescribed for use at his distillery, and to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment in accordance with the regulations of the Commissioner of Internal Revenue, who is hereby further authorized to order and require such changes of, or additions to distilling apparatus, connecting pipes, pumps, or cisterns, or any machinery connected with or used in or on the distillery premises, or may require to be put on any of the stills, tubs, cisterns, pipes, or other vessels, such fastenings, locks, or seals as he may deem necessary.

It was under the provisions of this statute that the contract between the Commissioner of Internal Revenue, and Isaac P. Tice (Record pp. 7, 8,) was made.

These statutes, and contracts, relating to this subject, are *in pari materia*, and are but a continuation of that system, or device, which had its origin in the 15th Section of the act of March 2nd, 1867. This Court, in the case of *Tice* vs. *United States*, recognized the correctness of these propositions in the following language:

"We concur with the learned counsel for appellants in the proposition, that the contract made April 18th, 1867, by the Secretary of the Treasury with Tice, was not abrogated by

the joint resolution of Feb. 3rd, 1868. By the terms of the resolution it was only *suspended* until final action by the Commission, whose report was designed as the foundation of a statute which would designate the kind of meters which should be adopted. But express authority to make a new contract was conferred by the act of July 20th, 1868, upon the Commissioner of Internal Revenue. That officer was empowered to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instrument or *meters*, as he might deem necessary. It was by virtue of its provisions that the argreement of Sept. 16th, 1868. was made."

It is clear, therefore, that the relation, between the Government and Tice, were that of *Contractors* with all the rights, obligations, duties, and remedies incident to that relationship clearly limited, fixed, and defined.

B. The relation of the Government to the appellants, under the applications made by them for the two sets of meters to be attached to their distilleries, was that of a contractor to furnish a mechanical device for a specific purpose, to be used in a particular way for a price agreed upon and paid to the Government before the delivery of the machines ordered by the appellants.

The subject-matter of the contract was two meters, which were to be attached by the United States to the appellants' distilleries, for a specific object and purpose. The appellants *were required to pay and did pay* for these meters the price fixed therefor by the United States. The appellants were also required to pay the cost of their transportation to, and the expense incident to the attachment of the meters to their distilleries.

These expenses the appellants also paid. The appellants had nothing to do with furnishing of the meters, except to pay for them, and the additional cost of their transportation and attachment.

The United States assumed the duty and obligations under the act of July 20, 1868.

1st. To have the Commissioner of Internal Revenue select such meter as he might deem necessary to ascertain the quantity, gravity, and producing capacity of any mash, wort, or beer used or to be used in the production of distilled spirits, and the strength and quantity subject to tax, such meter to be used for the prevention and detection of frauds by distillers.

2nd. That such meter when selected shall be attached in accordance with the regulations prescribed by the Commissioner of Internal Revenue.

The Commissioner of Internal Revenue having selected the "TICE METER," caused the same to be manufactured, and *required* the appellants to purchase the same at prices and upon terms fixed by the United State and Tice. The appellants were informed that the meters for which they paid this money, would be *furnished* by the United States upon the following terms and conditions, viz:

1. The appellants should deposit with the Collector of Internal Revenue for the Collection District in which their distilleries were located, the price they were required to pay for said meters, *in advance of their delivery.*

2. The application for the meter made at the time this deposit, was required to indicate the kind, character, and capacity of meter needed and desired.

Form No. 7. Rec pp. 17, 18.

3. That the United States should, in obedience to this application, deliver to its Collector of Internal Revenue, where the appellants' distilleries were situated, such meters as were described in the application made therefor, by the appellants.

4. That the meters ordered should be inspected at the place of manufacture, and before shipment.

5. That the meters should be attached to the distilleries of the appellants by some agent representing the manufacturer, and an assistant assessor of the United States Internal Reve-

nue, detailed for that purpose by the assessor of the Revenue District, where appellants' distilleries were located.

6. The meters were to be again inspected after attachment.

7. They were to be attached to and used at the appellants' distilleries after such test, "for the prevention and detection of frauds by distillers of spirits," and "for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer, used or to be used in the production of spirits, and the strength and quantity of spirits subject to tax." (See acts of Congress, March 2, 1867, and July 20, 1868.)

Thus it is clear that the United States took upon itself and assumed the obligation, upon the deposit of the price to be paid for the meter, with the application therefor, to furnish to the appellants such a meter as the Commissioner of Internal Revenue, acting under the authority of the Statute, should consider best suited to attain the object sought by the statute. If it shall be objected that the act of July 20th, 1868, required the appellant *to furnish and attach at their own expense, such meters as should be prescribed for use at their distilleries*, and that the United States assumed neither any duty or obligation in respect to the "furnishing and attachment" thereof, then it is replied that the appellants could only furnish and attach such meters as the United States, speaking through its Commissioner of Internal Revenue, should prescribe. They had no right to exercise either volition or judgment as to the kind of instrument or meter to be furnished, the manner by which its value or usefulness should be determined, or in what way it should be attached to their distilleries, so as to attain the desired object.

They had but one duty, and but one obligation, and that was to make application to the U. S. Collector on the Government form, and pay for the meters, and also pay the expense incident to the attachment thereof to their distilleries. All these things they did so far as they were required to do them.

When they had made their applications and paid the price demanded for the meters, the obligation of the United States commenced. That obligation was the same that an individual would assume under a similar state of facts, and that legal proposition may with propriety be stated, as follows:

C. That the United States having received from the appellants their application for, and the consideration to be paid for a "Tice Meter," undertook and agreed to furnish such a meter as would meet the requirements of the statutes; and that the meter ordered and furnished should be inspected, tested, and attached to the appellants' distilleries in the manner provided in the contracts and regulations.

The United States, by the terms of the special contracts under which it caused these meters to be manufactured, made the following certain covenants; that contained in the contract of April 18, 1867, provided that—

"Each set of meters will be tested by any officer detailed for the purpose, before being removed from the factory, and again after being finally connected with the distillery, and no meter will be accepted which is not found to work satisfactorily, when subjected to these tests."

That contained in the contract of September 16, 1868, was as follows:

"Samples of the meters A and B, and of the single and double counter meters will be kept, and each set of meters will be tested and compared with the sample, by an officer detailed for that purpose, before being removed from the factory, and again, after being finally attached to the distillery, *and if any meter, upon being so attached, shall prove to be defective in any respect, the defective part* shall be *replaced, or a new meter furnished, without additional expense to the distiller.*"

These were the express covenants of the United States with the distiller, and they were designed to secure to the distil-

ler a perfect, complete, and useful meter. The appellants paid for *that*; they did not pay for an *experiment, a dummy, or a scarecrow.*

But without these express covenants, the law of contracts, upon the facts appearing here, imposed upon the United States an obligation none the less certain.

That familiar principle by which the obligation is declared, is that the law implies a promise or undertaking from a manufacturer, that all goods manufactured and sold by him for a specific purpose, and to be used in a particular way, are reasonably fit and proper for the purpose for which he professes to make them, and for which they are known to be required.

Addison on Contracts, Am. Ed., Vol. 2, Sec. 219.

The rule of *caveat emptor* is reversed when goods are intended for a special purpose.

Chitty on Contracts, 10 Am. Ed., 475, and notes.

Especially when the vendee had no reasonable opportunity to inspect them. Ib.

There was here, both an *express* and an *implied* undertaking, that the meters ordered and paid for by the appellants should be fit for that service for which the *contractor*, the United States, and the *manufacturer*, the agent of the United States, knew they were designed to be used.

D. The United States having received the appellants' money for a specific purpose and object, is liable in an action ex contractu, to refund the money so received, unless it shows compliance with the conditions upon which it received the appellants' money.

None of the conditions upon which the United States received the appellants' money have ever been performed or complied with—

1. There was no inspection and test of either of the meters at the factory before shipment.

2. There was no assistant assessor detailed to attach the meters at appellants' distilleries, at any time.

3. There was never any *delivery* of either of the meters to the appellants, in the manner required by the regulations.

Those meters ordered in October, 1868, arrived without previous inspection December 19, 1868, but no person was ever sent to inspect them there, or attach them to the distillery, for which they were ordered. These meters did not become the property of the distiller, until they were attached to his distillery, and tested by the officer appointed for that purpose. The regulations provided certain specific tests and reports to be made by which the utility of the meter could be determined; but these were never made.

Those meters ordered March 12, 1869, were attached to the appellants' distillery about September 1, 1869, "*but they never did work properly.*"

By the terms of the contract, a defective meter was to be made perfect, or a new meter furnished. It is not evidence of *delivery* and acceptance, where the facts show that the meter put up and attached did not work. Neither the distiller, nor the assistant assessor had any authority to accept a *defective* meter, and it was only perfect and complete meters that ever could became the property of the distiller.

None of that character were ever delivered, and it is insisted that there could be no *actual* or *constructive delivery* of these meters, until all the tests, inspections, adjustments, attachments, and reports necessary to determine their utility had been made; until that was done, the property in these meters did not pass to the distiller; and no recovery of the contract price which the United States agreed to pay for them could be had until there had been such delivery and acceptance.

4. The meters shipped by the United States to the appellants, in compliance with their application therefor, were both

useless and worthless, and their use by the United States was discontinued for that reason, on the 8th day of June, 1871.

Record pp. 15, 16.

It is to be observed, in considering these facts, that the appellants were excluded from participation in any of the transactions between the Government and its manufacturer, from the making of the applications for the meters, until their final attachment and test at the distilleries.

The distiller dealt only with the Government; he was not permitted to have any negotiations with the inventor of the meter.

The United States fixed the price. The application for a meter could only be made through a Collector of Internal Revenue. The money was paid to a collector, and was *public* money. The obligation to pay for the meters was assumed by the United States; and that obligation was not disavowed until the order of June 7, 1870, was issued; but that order did not repudiate the obligation of the Government to pay for meters previously manufactured; it only related to those manufactured *subsequent* to that date.

The Government took the money belonging to appellants, and agreed, in consideration thereof, to furnish such meters as it had prescribed for use in distilleries, for a specific object and purpose. It made with the distiller both an *express* and an *implied* warranty, that the meters it should furnish should be suited to the purpose for which they were ordered and manufactured; that they should be useful and valuable, and not useless and worthless.

It is upon these warranties, and for a breach of them, that the Government is liable to the appellants. The facts are not disputed. The only legal question is, do they establish a contract and breach thereof between the United States and the appellants.

The appellants looked only to the Government to furnish these meters.

The manufacturer, who was the contractor and agent of the Government, was a stranger to them. They could not compel the manufacturer to furnish the meters for which they had paid their money to the United States. They had no power to compel the manufacturer to furnish perfect meters, or to reject those that were imperfect. The defaults of the manufacturer were to the United States, and not the appellants. They could never have had any cause of action against Tice, even if he had deliberately put their money in his pocket, and never made any effort to furnish a single meter. THE APPELLANTS HAVE THE SAME RIGHTS AND REMEDIES AGAINST THE UNITED STATES, FOR THE BREACH OF THESE EXPRESS AND IMPLIED WARRANTIES, THAT THE UNITED STATES HAD AGAINST TICE. The United States could have protected itself from loss by refusing to pay the manufacturer for the meters, until they were made to fullfil the purposes for which they were required. The Government was under no obligation to pay Tice until the meters had been inspected, attached and tested. If they were defective, he became entitled to no pay, and the meters were to be rejected. Here was a breach of both an express and an implied warranty, both by Tice to the Government, and by the United States to the appellants.

In such a case, the person to whom the warranty has been given, *may sue without a return of the goods.* He is not obliged to rescind the sale.

Dorr vs. Fisher, 1 Cush., 273.
Vincent vs. Leland, 100 Mass., 434.
Manufacturing Co. vs. Gardner, 10 Cush., 83.
4 Kent, 480.
And see English Cases.
Street vs. Blay, 2 B, and Ad., 456.
Gompertz vs. Denton, 1 C. and M., 207.
Dawson vs. Collis, 30 C. B., 523.
Fielder vs. Starkin, 1 H. Bl., 17.
Patteshall vs. Tranter, 4 N. and Mann., 649.
S. C., 3 Ad. and Ell., 103.

The doctrine of these English cases has met the approval of this Court in—

Lyon vs. Bertram, 20 How., 154,

and more recently in—

Smeltzer vs. White, 2, Otto, 390, 395.

But the United States is liable to refund this money for another reason. If the relation of the United States to the appellants in regard to these meters was *not* that of a contractor to furnish specific articles to be used for a particular purpose, *for a price paid*, before the delivery of the articles, then it was that of a TRUSTEE of the appellants, having their money in its hands for a specific object and purpose, and to be paid out only upon conditions which the United States had prescribed. The United States, in exacting the deposit of this money, assumed to the appellants both the duty and the obligation to retain it for their use, until all the terms and conditions of the regulations and contracts in regard to the delivery, testing, and attachment of the meters had been fulfilled. The order of January 8th, 1869, to forward to the manufacturer no deposits received from distillers in payment for meters, "*until they are attached to the distilleries,*" was only the recognition of an obligation that the law imposed, and that was: not to part with the money until that perfect and complete meter which the contract required had been furnished, attached, and tested. The payment of money so held, to a person to whom the appellants were strangers, was a payment of it in contempt and violation of the trust which the United States assumed when it received the deposit; and such a payment as between individuals always renders the trustee liable to his *cestui que trust.*

It is conceded that the United States can only enter into contracts authorized by law, but when the law authorizes the making of the contract, or the making of it is a legitimate exercise of a power or duty which the law imposes upon a public officer or agent, then the same legal liabilities are as-

sumed, the same rules of construction are to be applied, that are applicable to similar contracts between individuals when brought into consideration in the ordinary tribunals of justice. When the United States, acting in its corporate character, under authority of law, becomes a *contractor*, it loses that immunity from liability which attaches to its sovereign or political character.

Gibbons vs. *United States*, 8 Wall., 272.
United States vs. *Speed*, 8 Ibid, 77, 84.
United States vs. *Smoot*, 15 Ibid, 45.
United States vs. *State Bank*, 96 U. S. R., 30.
United States vs. *Bank of Metropolis*, 15 Pet., 377.
United States vs. *Hillegas*, 3 Wall., C. C., 70.
Thorndike's Case, 2 Mason, 20.
Amoskeag Co., 17 Wall., 892.
United States vs. *Smith*, 94 U. S. R., 217.

It is only that obligation which would be without doubt or question, were this suit between individuals, that the appellants seek to enforce here. They seek against the United States only that judgment and measure of liability that would be awarded if this suit were between them and another citizen in this tribunal, upon the same facts. The facts are neither uncertain or doubtful, and the legal principles to be applied to them are as old and familiar as the law of contracts by which the rights and obligations of individuals are to be determined.

VI.

The Opinion of the Court of Claims.

The whole argument of that Judge of the Court of Claims, who delivered the opinion in this case, was directed to the invention of excuses, that would seem to justify the United States in extorting money from its citizens without returning any equivalent therefor. It was more the argument of a paid attorney for the Government, than the impartial examin-

ation and decision of the case upon those principles of absolute right and justice, which always inspires the opinion of a Judge, whose only desire is that he may know the case clearly, and apply to it those principles of law by which human actions and rights must always be determined.

It is proposed to examine *seriatim* the *excuses*, not *reasons*, that the Court of Claims invents for dismissing the appellants' petition.

1st. "*That the meters did not prove a success, either because of the trouble and expense they caused to the distiller, the additional trouble to the storekeeper, assessor, and other officers, the reduction of the tax on spirits, from* $2 *to* 50 *cents a gallon, thereby lessening the objects and the attempts to commit fraud,* OR FOR OTHER CAUSES."

Record p. 25.

It is difficult to discuss the "OTHER CAUSES," since they must be left entirely to the *imagination*.

The specific excuses which the Court, in the plenitude of its wisdom, and the brilliancy of its imagination, furnish for the abandonment of the use of these meters in the sentence above quoted, are:

1st. Because of the trouble and expense they caused the distiller. This had already been imposed on appellants.

It would have been an invalid, unlawful reason if true.

2d. Because of the additional trouble to the storekeeper, assessor, and other officers.

It is a singular assumption, that, for such a cause, a law of Congress had to be disregarded by commissioned bonded officers, sworn to administer it.

3d. Because the tax was lowered, and the incentive to commit frauds was lessened.

This assumption is equally gratuitous, and a broad accusation that appellants, who were lawfully licensed, would under a certain condition of the law criminally violate it.

It is also an assumption that distillers, as a class, are guilty of fraud, and convicts them of dishonesty by reason of their occupation, instead of leaving them with that presumption of innocence, which protects every man until by *evidence* the contrary fact is established.

It is remarkable that such an erroneous assumption as this should be made. The act of July 20, 1868, fixed the rate of tax at 50 cents per proof gallon, 15 Stat. at L. 125, Sec. 1. [it is now 90 cents,] and in Sec. 3, of the same act, is the authority for prescribing meters. There was no change of tax until June 6, 1872, when it was increased to 70 cents per proof gallon, but use of the meters was discontinued June 8, 1871, [Rec. p. 15,] *before* any increase had been made. Not to follow the erroneous opinion of the Court below in assigning reasons, the record shows that they were discontinued because of irremedable defects of material, workmanship, construction, and functions. There is nothing in the record to warrant any of the assumptions of the Court. The act of repeal [17 Stat. at Large, 239,] and the letter of the Commissioner, June 8, 1871, [Rec. p. 15,] give the true reasons for discontinuing the use of these meters, and these reasons were because they (the meters) were imperfect in construction, and useless for the purpose for which they were designed and purchased.

2. "*The meter was for the use and benefit of the defendants, to enable them to prevent and detect frauds, and for no other purpose.* * * * * * *

"*If not used by the officers, the defendants lost the benefit of one check upon the distillers, and that was all.*"

Record p. 26.

The law shows that besides being used for the detection of frauds, they were "for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used or to be used in the production of spirits, and the strength and quantity of spirits subject to tax; so the statement of the Court is grossly erroneous.

ation and decision of the case upon those principles of absolute right and justice, which always inspires the opinion of a Judge, whose only desire is that he may know the case clearly, and apply to it those principles of law by which human actions and rights must always be determined.

It is proposed to examine *seriatim* the *excuses*, not *reasons*, that the Court of Claims invents for dismissing the appellants' petition.

1st. "*That the meters did not prove a success, either because of the trouble and expense they caused to the distiller, the additional trouble to the storekeeper, assessor, and other officers, the reduction of the tax on spirits, from* $2 *to* 50 *cents a gallon, thereby lessening the objects and the attempts to commit fraud,* OR FOR OTHER CAUSES."

Record p. 25.

It is difficult to discuss the "OTHER CAUSES," since they must be left entirely to the *imagination.*

The specific excuses which the Court, in the plenitude of its wisdom, and the brilliancy of its imagination, furnish for the abandonment of the use of these meters in the sentence above quoted, are:

1st. Because of the trouble and expense they caused the distiller. This had already been imposed on appellants.

It would have been an invalid, unlawful reason if true.

2d. Because of the additional trouble to the storekeeper, assessor, and other officers.

It is a singular assumption, that, for such a cause, a law of Congress had to be disregarded by commissioned bonded officers, sworn to administer it.

3d. Because the tax was lowered, and the incentive to commit frauds was lessened.

This assumption is equally gratuitous, and a broad accusation that appellants, who were lawfully licensed, would under a certain condition of the law criminally violate it.

It is also an assumption that distillers, as a class, are guilty of fraud, and convicts them of dishonesty by reason of their occupation, instead of leaving them with that presumption of innocence, which protects every man until by *evidence* the contrary fact is established.

It is remarkable that such an erroneous assumption as this should be made. The act of July 20, 1868, fixed the rate of tax at 50 cents per proof gallon, 15 Stat. at L. 125, Sec. 1. [it is now 90 cents,] and in Sec. 3, of the same act, is the authority for prescribing meters. There was no change of tax until June 6, 1872, when it was increased to 70 cents per proof gallon, but use of the meters was discontinued June 8, 1871, [Rec. p. 15,] *before* any increase had been made. Not to follow the erroneous opinion of the Court below in assigning reasons, the record shows that they were discontinued because of irremedable defects of material, workmanship, construction, and functions. There is nothing in the record to warrant any of the assumptions of the Court. The act of repeal [17 Stat. at Large, 239,] and the letter of the Commissioner, June 8, 1871, [Rec. p. 15,] give the true reasons for discontinuing the use of these meters, and these reasons were because they (the meters) were imperfect in construction, and useless for the purpose for which they were designed and purchased.

2. "*The meter was for the use and benefit of the defendants, to enable them to prevent and detect frauds, and for no other purpose.* * * * * * *

"*If not used by the officers, the defendants lost the benefit of one check upon the distillers, and that was all.*"

Record p. 26.

The law shows that besides being used for the detection of frauds, they were "for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used or to be used in the production of spirits, and the strength and quantity of spirits subject to tax; so the statement of the Court is grossly erroneous.

The *appellants*, not less than the Government, had the highest interest in having the spirits produced at their respective distilleries accurately and justly measured. It was important to them as fixing the amount of tax they would be required to pay. They were also interested in having these instruments so perfect and complete, that there could be no question as to the correctness of the record of the product of their respective distilleries. The attainment of that result would not only have relieved them from any liability to pay an unjust and fictitious tax, but also from any liability to any imputation or suspicion of attempting to defraud the Government. It would have put all distillers on an equal footing, and relieved them from any competition with those distillers who might, by a fraudulent combination with the revenue officers, have defrauded the Government of the tax upon the spirits they produced, by which they were able to undersell the honest distiller.

Thus the appellants were interested in seeing not only that their commodities were taxed by a system of admeasurement uniform through the land, but that the liabilities of all other citizens similarly situated should be ascertained by an equal administration of the law.

It was an instrument which would accomplish for the distiller these results, that the Commissioner undertook to furnish and prescribed for use; because the act of Congress declares that the Commissioner is authorized to adopt and prescribe * * * meters *for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used or to be used in the production of distilled spirits* and the strength and quantity of spirits *subject to tax*," and when he thereafter prescribes such instruments, they must be used for the purpose indicated, or all consideration fails. They were not for ornament; they were for *use*; and they were to be used in a particular way, known only to the manufacturer and to the Revenue officers; and they were manufactured only for that purpose, and were not claimed to be useful for any other. The

In 6 Texas, 110, the Court, in defining a "*forced sale,*" says—

"A forced sale has been defined to be a sale made at the time and in the manner prescribed by law, in virtue of an execution on a judgment already rendered by a Court of competent jurisdiction; or in other words, a forced *sale* is one which is made under the process of the Court."

F. It is most respectfully submitted that an action by the mortgagee to recover the possession of the mortgaged property, and hold it, and apply the rents and profits to his use until thereout his debt is paid, cannot be by any possibility called a *sale,* or *inhibited* under a provision which prohibits "a forced sale."

We must suppose the object of the Constitution of Texas was to prevent the *sacrifice* of the homestead by its exposure to a *forced* sale; and we have seen that it is settled law in the Texas Courts that it was not the intention of the Constitution to prevent *any* sale of the mortgaged property to satisfy the debt, as a sale is perfectly permissible if the mortgagor inserts a power for this purpose in the mortgage-deed.

What possible objection then can be made, under this provision of the Constitution, to the mortgagee taking *possession* of the property, and holding it till his debt is paid?

XIII.

If the appellant has not this remedy, what is the necessary consequence?

1. His mortgage is a perfectly valid lien on the homestead.

2. He cannot file a bill for foreclosure by sale, because this is a forced sale.

3. Unless, therefore, he can maintain this action for possession, he has no remedy on a *perfectly* valid mortgage to make his debt. Is not this a mockery of justice?

XIV.

A new Constitution was adopted by the people of Texas in the year 1875. This Constitution contains the following additional provision in reference to homesteads.

"No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust deed or other lien shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead, involving any condition of defeasance, shall be void."

A. This provision can have no application to the rights secured to the appellant by the mortgage of May 2d, 1873.

It is settled law in this Court, that any statute which substantially alters the security given by a mortgage, passed after the mortgage was made, is ineffectual to affect the rights of the mortgagee.

1 Howard, 318, Bronson vs. Kinzie.

B. Nor does it make any difference whether this is done by a Constitution or a law of the State.

10 Wall. 515, R. R. Co. vs. McLure.

15 Wall. 610, Gunn vs. Barry.

XV.

If we are right in the foregoing, then it follows that the appellees, if they desired to stop the proceedings instituted by the appellant to recover possession of the mortgaged property, were bound to offer in their bill to redeem the mortgaged property by payment of the mortgage debt. It will be observed there is no such offer, the bill going upon the theory that there was no such obligation on the mortgagors.

The omission to offer to redeem was, therefore, fatal to the bill of complaint; and this was the ground assigned as special cause of demurrer in the demurrer filed in the Court below. (Record, page 12, folio 28.)

XVI.

There is a still further defect in the bill of complaint in this cause, which, it is submitted, justified the demurrer filed to it.

There is no allegation that the lots claimed as the homestead were not worth more than $5000. The indebtedness secured by the deed of May 2, 1873, was over $7000.

The constitution only exempts, even from a forced sale, a city homestead not exceeding in value $5000, independently of the improvements.

Should not the bill have alleged that the value did not exceed $5000?

The burden of proof is on him who sets up the exception.

43 Texas, 195, Iken vs. Olenick.

It is respectfully submitted that the decree of the Court below should be reversed, and the bill of complaint dismissed.

BERNARD CARTER,
For Appellant.



In Supreme Court,

U. S.

SAMUEL J. LANAHAN, APPELLANT,

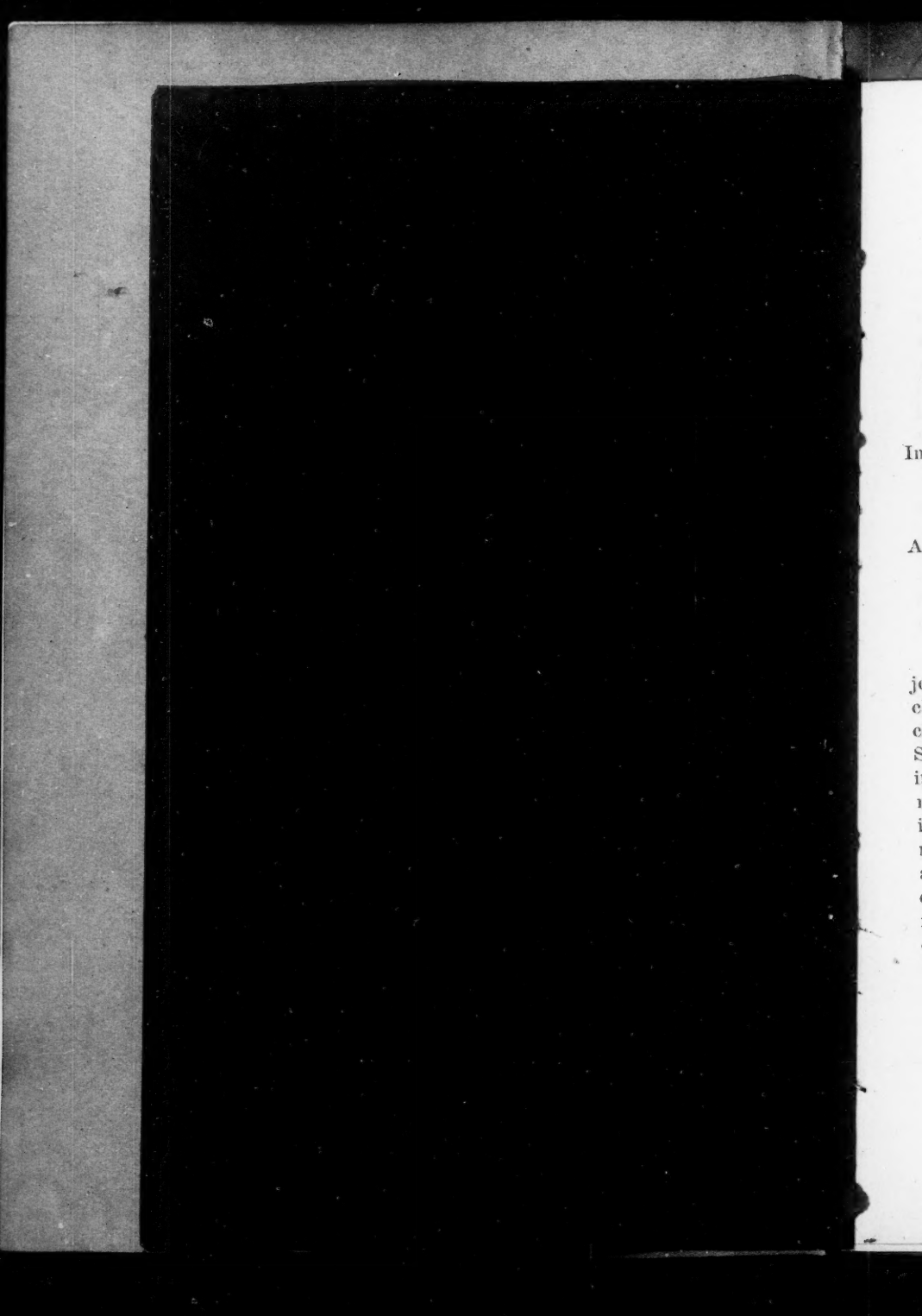
VERSUS

CLARA SEARS AND JAS. E. SEARS, APPELLEES.

Appeal from Circuit Court, Fifth Circuit, Western District of Texas.

BRIEF OF APPELLEES.

Drake, printer, Carter building, Waco.



SAMUEL J. LANAHAN, APPELLANT,

VERSUS

CLARA SEARS AND JAS. E. SEARS, APPELLEES.

In Supreme Court of the United States, October Term, A. D. 1877.

IN CHANCERY.

Appeal from the Circuit Court of the U. S. for the Western District of Texas, 5th circuit, holding sessions at Austin, January Term, A. D. 1877.

STATEMENT OF CASE.

On the 28th of February, 1876, appellee, Clara Sears, joined by her husband, James E. Sears, filed her bill in chancery, praying that appellant be restrained from proceeding in his certain action of ejectment against James E. Sears, No. 1653, on law docket of said Circuit Court, alleging that she is the wife of James E. Sears, that the instrument of writing upon which said action at law was based is a mortgage to secure the payment of certain indebtedness due and owing by said James E. Sears to Lanahan and son, of Baltimore; that Samuel J. Lanahan is the successor of Lanahan and son, and fully cognizant of all the facts alleged in said bill; that a portion of the property conveyed by said mortgage, and included in said action of ejectment, to-wit: lots 4, 5, 6, 7, in block 26, on 3d street, in the city of Waco, McLennan county, Texas, is the homestead of herself and husband, and was at the date of the execution of said mortgage and since that time, and that by the constitution and laws of said State of Texas complain.

ants could not be ejected from their said homestead by reason of said instrument by any proceedings in the courts of said State, or in the U. S. courts held in said State; that said instrument of writing, upon which said action at law was based, while purporting to be an absolute conveyance, was in fact a mortgage; and that said complainant, Clara Sears, signed the same with that understanding, and did not intend by her said act to execute any other instrument conveying her said homestead; that on the day said instrument was executed a defeasance in writing was also executed by the authorized agent of said Lanahan and son for said lots—the aforesaid homestead—to complainant, James E. Sears, which is attached to said bill as an exhibit. And by the constitution and laws of said State said mortgage could not be foreclosed against said homestead and the same subjected to forced sale; hence the prayer in said bill.

On the date of filing said bill, after hearing, a preliminary injunction was granted as prayed for, by the Hon. T. H. Duval, Judge of said Court.

On March 16, 1876, appellant filed his demurrer to said bill and moved for dissolution of said injunction for want of equity in said bill, and because complainants did not tender the money in said Court to discharge said mortgage.

On March 7, 1877, after argument said demurrer was overruled by the Court and appellant given until next succeeding rule day to answer said bill.

And April 17, 1877, appellant having failed to answer final decree was entered perpetuating said injunction, from which decree appellant appeals to this Court, having filed his petition for appeal on August 2, 1877.

BRIEF OF APPELLEES.

The two instruments taken together, to-wit: Deed from Sears and wife to Robertson and defeasance by Robertson

to Sears, see Trans. exhibits A and B attached to bill, are one instrument in law and equity and should be so construed and constitute a mortgage.

4 Kent, p. 141.
2 Story, Eq. Juris. §1018 and notes.
Kerr v. Gilmore, 8 Watts, 408.
Jackson v. McKenney, 3 Wend. 233.
Holbrook v. Finney, 4 Mass. 569.
Jackson v. Ball, 1 Johns cases, 91.
Cornell v. Todd, 2 Denio, 130.
Jackson v. Dewitt, 6 Cow. 316.
4 Phillips Ev. 1421.
Eppinger v. McGreal, 31 Tex. 148.
Stephens v. Sherrod, 6 Tex. 297–301.
Wallis v. Beauchamp, 15 Tex. 182–305.
Dunlap v. Wright, 11 Tex. 602.
Boatwright v. Peck, 33 Tex. 73-76.
Hughes v. Edwards, 9 Wheat, 489.
Kelleran v. Brown, 4 Mass. 443.
James v. Johnson, 6 Johns, 417.
Harvey v. Davis, 7 Johns, 40.
Stoeven v. Stoeven, 9 Serg. and R. 434.

Title to land can be acquired and lost only in the manner prescribed by the law of the State where such land is situated.

U. S. v. Crosby, 7 Cr. 115.
Doctrine sup't in Clark v. Graham, 6 Wh. 577.
" " Kerr v. Moore, 9 Wh. 565.
" " McCormick v. Sullivant, 10 Wh. 192.
" " Watts v. Waddle, 6 Pet. 389.
" " Perry Manf'g Co. v. Brown, 2 W. and Minots, 450.
" " Root v. Brotherson, 4 McL. 234.

And in numerous other cases wherever the point has been raised in this Court.

In equity the fee remains in the mortgagor and mortgage is treated simply as a security for the payment of the debt.

2 Story Eq. Juris. § 1015-1017.

The Courts of the State of Texas hold that only this equitable rule applies in this State. Here the fee does not pass by the execution of the mortgage, but remains with the mortgagor.

Duty v. Graham, 12 Tex. 432-437.

Mann v. Falcon, 25 Tex. 274-275.

The lots mentioned in appellee's bill are the homestead of complainants and were at the date of the mortgage, and have been since that time. By the laws of Texas, the homestead of a family is not subject to forced sale, and any process of a Court which would deprive a family of the use and enjoyment of the homestead is included in the provision of the constitution and laws exempting the homestead from forced sale. The appellant seeks by his action at law in the U. S. Court to get possession of the homestead of appellees and thus evade the operation of the organic and statutory laws of the State, which protect them in its use and enjoyment.

The foreclosure of the mortgage, either strict foreclosure as attempted by appellant by his action of ejectment or a resort to equity and an action on the mortgage as such is in contravention of the constitution and laws of Texas exempting this character of property from forced sale. This has ever been the case since the first organization of the State of Texas as a State.

In Sampson & Keene v. Williamson, 6 Tex. 117, Chief Justice Hemphill uses this language:

"The Constitution obviously intended that the homestead should be exempted from the operation of any species of execution, or from any forced disposition of the property, whether partial or total, which would disturb the family in the quiet and uninterrupted possession of their

home with the property thereto attached. The beneficence of the provision has a much wider range than to protect the family from a sale which would utterly extinguish all right in the property. It shields them also from any extents or deliveries of the property or from any forcible appropriation of its rents, issues and profits. It protects the domestic sanctuary from every species of intrusion, which under color of law, would subject the property, by any disposition whatever, to the payment of debts."

Constitution of Texas, 1845, Art. 7, Sec. 22, 1st vol. Pas. Dig. Laws.

Arts. 2928, 3798 and 3798 a, Pas. Dig. Laws of Texas.

Constitution of Texas, 1869, Art. 12, Sec. 15.

Art. 6994, 2 Pas. Dig. Laws (Act of 1870) of Texas.

Constitution of Texas, 1875, Art. 16, Sec. 50.

Sampson & Keene v. Williamson, 6 Tex. 109-126.

Stewart v. Mackey, 16 Tex. 57, 58.

Jordan v. Peak, 38 Tex. 440, 441.

Moore v. Whitis, 30 Tex. 443, 444.

Aff. Hancock v. Morgan, 17 Tex. 582.

Aff. Pryor v. Stone, 19 Tex. 373.

Aff. Sassaman v. Powell, 21 Tex. 664.

Wilson v. Cochran et al. 31 Tex. 678, 679.

Blain & Co. v. Thorp, 33 Tex. 48, 49.

(Boatwright v. Peck, 33 Tex. 73-76, on similar instrument to one in case at bar.)

Morrison v. Bean, 15 Tex. 268, 269.

(Stone v. Darnell, 20 Tex. 13-15; after levy of execution defendant moved an land. Court held that he was protected by homestead exemption.)

Baxter v. Dean, 24 Tex. 20, 21.

The Constitution of the State of Texas of Sept. 6, 1875, which went into effect April 26, 1876, and is the existing constitution, in its 16th article, latter clause of section 50, uses this language:

"No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as herein before provided, whether such mortgage or trust deed or other lien shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void."

Query: Does not this provision apply to mortgages on the homestead in existence when the constitution went into effect? And in its application to the instrument under discussion in the case at bar can it be said to be obnoxious to art. 1 sec. 10 of the Constitution of the United States?

The Court is referred to Texas Reports heretofore cited on the homestead exemption.

The contract between appellant and appellees at the date of its execution was subject to the existing laws which protected appellees in the use and enjoyment of their homestead, and denied to appellant any remedy by which said contract could be enforced as against their homestead property, and having been made in view of the then existing laws of the State effecting the rights of appellant or the obligations of appellees, the provision of the constitution referred to, does not impair the obligation of the contract, but is rather declarative of what the law was heretofore in Texas on the validity of mortgages upon homesteads.

Cooley Con. Lim., 3d ed. bottom pages 322-330, and notes.

The law of Texas denying the right to enforce the collection of the debt out of the security and protecting appellees in the use and enjoyment of their homestead and against any remedy or process of the Court which would deprive them of their homestead or any privileges attaching thereto, no tender was necessary on their part to claim this protection. To hold otherwise would be to ignore the constitution and laws of Texas and all rules and former

decisions of this Court on questions effecting the title to real property within the different States.

Sampson & Keene v. Williamson supra, and other Texas authorities previously cited.

U. S. v. Crosby supra, and other authorities previously cited to support the doctrine of that decision.

BALIE PEYTON,

Attorney for Appellees.

Per WM. M. FLOURNOY.